No. 89-431-CFX
Status: GRANTED

Title: Yellow Freight System, Inc., Petitioner
v.
Colleen Donnelly

Docketed:
September 13, 1989

Court: United States Court of Appeals
for the Seventh Circuit

Counsel for petitioner: Pasek,Jeffrey Ivan

Counsel for respondent: Henely,John J., Rathsack,Michael W.

Entry	Date	Note	Proceedings and Orders
1	Sep 13 1989	G	Petition for writ of certiorari filed.
2	Oct 13 1989		Brief of respondent Donnelly in opposition filed.
3	Oct 18 1989		DISTRIBUTED. November 3, 1989
4	Nov 6 1989		Petition GRANTED. limited to Question 1 presented by the petition.
			**********
5	Dec 6 1989		Record filed.
		*	Certified copy of C.A. Proceedings received.
6	Dec 11 1989		Joint appendix filed.
7	Dec 11 1989		Brief of petitioner Yellow Freight System filed.
8	Dec 21 1989		Brief amicus curiae of Equal Employment Advisory Council filed.
9	Jan 5 1990		SET FOR ARGUMENT WEDNESDAY, FEBRUARY 28, 1990. (1ST CASE)
11	Jan 9 1990		Order extending time to file brief of respondent on the merits until January 17, 1990.
13	Jan 17 1990	X	Brief of respondent Colleen Donnelly filed.
12	Jan 18 1990		CIRCULATED.
14	Feb 20 1990		Record filed.
		*	Certified copy of original record received.
15	Feb 23 1990	X	Supplemental brief of respondent Colleen Donnelly filed.
16	Feb 28 1990		ARGUED.

89-431

No.

In the Supreme Court of the United States

OCTOBER TERM, 1989

YELLOW FREIGHT SYSTEM, INC.,
Petitioner,

vs.

COLLEEN DONNELLY,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

JEFFREY IVAN PASEK
(Counsel of Record)
ALAN M. LERNER
COHEN, SHAPIRO, POLISHER,
SHIEKMAN AND COHEN
12 South 12th Street
Philadelphia, Pennsylvania 19107
(215) 922-1300

STEVEN J. TEPLINSKY
LEONARD R. KOFKIN
FAGEL, HABER & MARAGOS
140 South Dearborn, Suite 1400
Chicago, Illinois 60603
(312) 346-7500

Attorneys for Petitioner

Of Counsel:
RONALD E. SANDHAUS
10990 Roe Avenue
Overland Park, Kansas 66207
(913) 345-3000

E. L. MENDENHALL, INC., 926 Cherry Street, Kansas City, Mo. 64106, (816) 421-3030

QUESTIONS PRESENTED

Whether federal courts have exclusive jurisdiction over claims arising under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e *et seq.*

Whether a victim of employment discrimination is obligated to seek comparable employment, when such employment is available in the area, to be eligible for an award of back pay under § 706(g) of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e-5(g).

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules

Congressional Materials

Other Materials

No.

In the Supreme Court of the United States

OCTOBER TERM, 1989

YELLOW FREIGHT SYSTEM, INC.,
Petitioner,

vs.

COLLEEN DONNELLY,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Yellow Freight System, Inc. ("Yellow Freight") petitions for a writ of certiorari to review the judgment in this case of the United States Court of Appeals for the Seventh Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit dated April 28, 1989 (A-1 to A-19)[1]

1. References in the form (A-1 to A-.....) refer to pages of the Appendix. References in the form (T-.....) refer to pages of the Transcript of Proceedings before the Magistrate on November 3, 1987.

is reported as 874 F.2d 402. In an unpublished order dated July 17, 1989, the United States Court of Appeals for the Seventh Circuit denied Yellow Freight's Petition for Rehearing with Suggestion for Rehearing En Banc (A-20). The opinion of the United States District Court for the Northern District of Illinois entered March 17, 1988 on the issue of mitigation of damages is reported at 682 F. Supp. 374. The Report and Recommendation of the United States Magistrate (A-26 to A-34), entered December 10, 1987, is not reported. The opinion of the District Court entered November 22, 1985 on the issue of jurisdiction in Title VII actions (A-35 to A-39) is not reported. The order of the Circuit Court of Cook County, Illinois, dismissing plaintiff's complaint with prejudice and continuing her contested motion for leave to file an amended complaint, entered August 9, 1985 (A-40), is not reported.

JURISDICTION

The judgment of the United States Court of Appeals for the Seventh Circuit was entered on April 28, 1989 (A-1) and the Petition for Rehearing was denied on July 17, 1989 (A-20). The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTES INVOLVED

1. Section 706(f) of Title VII of the Civil Rights Act of 1964, as amended ("Title VII"), 42 U.S.C. § 2000e-5(f) provides as follows:

> Civil action by Commission, Attorney General, or person aggrieved; preconditions; procedure; appointment of attorney; payment of fees, costs, or security; intervention; stay of Federal proceedings; action for appropriate, temporary or preliminary relief pending final disposition of charge; jurisdiction and venue of United States courts; designation of judges to hear and determine case; assignment of case for hearing; expedition of case; appointment of master.
>
> (1) If within thirty days after a charge is filed with the Commission or within thirty days after expiration of any period of reference under subsection (c) or (d) of this section, the Commission has been unable to secure from the respondent a conciliation agreement acceptable to the Commission, the Commission may bring a civil action against any respondent not a government, governmental agency, or political subdivision named in the charge. In the case of a respondent which is a government, governmental agency, or political subdivision, if the Commission has been unable to secure from the respondent a conciliation agreement acceptable to the Commission, the Commission shall take no further action and shall refer the case to the Attorney General who may bring a civil action against such respondent in the appropriate United States district court. The person or persons aggrieved shall have the right to intervene in a civil action brought by the Commission or the

Attorney General in a case involving a government, governmental agency, or political subdivision. If a charge filed with the Commission pursuant to subsection (b) of this section is dismissed by the Commission, or if within one hundred and eighty days from the filing of such charge or the expiration of any period of reference under subsection (c) or (d) of this section, whichever is later, the Commission has not filed a civil action under this section or the Attorney General has not filed a civil action in a case involving a government, governmental agency, or political subdivision, or the Commission has not entered into a conciliation agreement to which the person aggrieved is a party, the Commission, or the Attorney General in a case involving a government, governmental agency, or political subdivision, shall so notify the person aggrieved and within ninety days after the giving of such notice a civil action may be brought against the respondent named in the charge (A) by the person claiming to be aggrieved or (B) if such charge was filed by a member of the Commission, by any person whom the charge alleges was aggrieved by the alleged unlawful employment practice. Upon application by the complainant and in such circumstances as the court may deem just, the court may appoint an attorney for such complainant and may authorize the commencement of the action without the payment of fees, costs, or security. Upon timely application, the court may, in its discretion, permit the Commission, or the Attorney General in a case involving a government, governmental agency, or political subdivision, to intervene in such civil action upon certification that the case is of general public importance. Upon request, the court may, in its dis-

cretion, stay further proceedings for not more than sixty days pending the termination of State or local proceedings described in subsections (c) or (d) of this section or further efforts of the Commission to obtain voluntary compliance.

(2) Whenever a charge is filed with the Commission and the Commission concludes on the basis of a preliminary investigation, that prompt judicial action is necessary to carry out the purposes of this Act, the Commission, or the Attorney General in a case involving a government, governmental agency, or political subdivision, may bring an action for appropriate, temporary or preliminary relief pending final disposition of such charge. Any temporary restraining order or other order granting preliminary or temporary relief shall be issued in accordance with rule 65 of the Federal Rules of Civil Procedure. It shall be the duty of a court having jurisdiction over proceedings under this section to assign cases for hearing at the earliest practicable date and to cause such cases to be in every way expedited.

(3) Each United States district court and each United States court of a place subject to the jurisdiction of the United States shall have jurisdiction of actions brought under this subchapter. Such an action may be brought in any judicial district in the State in which the unlawful employment practice is alleged to have been committed, in the judicial district in which the employment records relevant to such practice are maintained and administered, or in the judicial district in which the aggrieved person would have worked but for the alleged unlawful employment practice, but if the respondent is not found within any such district, such an action may be

brought within the judicial district in which the respondent has his principal office. For purposes of sections 1404 and 1406 of Title 28, the judicial district in which the respondent has his principal office shall in all cases be considered a district in which the action may have been brought.

(4) It shall be the duty of the chief judge of the district (or in his absence, the acting chief judge) in which the case is pending immediately to designate a judge in such district to hear and determine the case. In the event that no judge in the district is available to hear and determine the case, the chief judge of the district, or the acting chief judge, as the case may be, shall certify this fact to the chief judge of the circuit (or in his absence, the acting chief judge) who shall then designate a district or circuit judge of the circuit to hear and determine the case.

(5) It shall be the duty of the judge designated pursuant to this subsection to assign the case for hearing at the earliest practicable date and to cause the case to be in every way expedited. If such judge has not scheduled the case for trial within one hundred and twenty days after issue has been joined, that judge may appoint a master pursuant to rule 53 of the Federal Rules of Civil Procedure.

2. Section 706(g) of Title VII, 42 U.S.C. § 2000e-5(g), provides as follows:

Injunctions; affirmative action; equitable relief; accrual of back pay; reduction of back pay; limitations on judicial orders.

If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an

unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay (payable by the employer, employment agency, or labor organization, as the case may be, responsible for the unlawful employment practice), or any other equitable relief as the court deems appropriate. Back pay liability shall not accrue from a date more than two years prior to the filing of a charge with the Commission. Interim earnings or amounts earnable with reasonable diligence by the person or persons discriminated against shall operate to reduce the back pay otherwise allowable. No order of the court shall require the admission or reinstatement of an individual as a member of a union, or the hiring, reinstatement, or promotion of an individual as an employee, or the payment to him of any back pay, if such individual was refused admission, suspended, or expelled, or was refused employment or advancement or was suspended or discharged for any reason other than discrimination on account of race, color, religion, sex, or national origin or in violation of section 2000e-3(a) of this title.

3. Section 706(j) of Title VII, 42 U.S.C. § 2000e-(5)(j) provides as follows:

Appeals

Any civil action brought under this section and any proceedings brought under subsection (i) shall be subject to appeal as provided in sections 1291 and 1292, Title 28.

STATEMENT OF THE CASE

This case was initially instituted in the Circuit Court of Cook County, Illinois on May 22, 1985. Asserting that Yellow Freight had wrongly refused to hire her for a job as a dock worker, plaintiff brought a two-count complaint alleging sex discrimination in violation only of the Illinois Human Rights Act (Ill. Rev. Stat., Chapter 68, ¶ 1-101 et seq. (1983)). Because plaintiff had not attempted to exhaust her administrative remedies, Yellow Freight filed a motion to dismiss the Complaint for lack of jurisdiction. Plaintiff then sought leave to file an amended Complaint.

On August 9, 1985, the Circuit Court entered an agreed order dismissing the Complaint with prejudice and continuing plaintiff's contested motion for leave to file an amended Complaint (A-40). On August 14, 1985, Yellow Freight removed the case to the United States District Court pursuant to 28 U.S.C. § 1441(b) and (c). On September 13, 1985, the District Court granted plaintiff leave to file an amended Complaint, and on September 20, 1985, plaintiff, for the first time, filed a Complaint alleging violations of Title VII. Yellow Freight's motion to dismiss the amended Complaint for lack of jurisdiction was denied by the District Court. The District Court held that State Courts have concurrent jurisdiction over Title VII claims (A-35 to A-39).

Plaintiff first applied to Yellow Freight on October 26, 1982, at a time when the company was not hiring dock workers. The terminal manager informed plaintiff that the company was not hiring but that she would be the first person hired when the situation changed. Yellow Freight did not begin hiring dock workers until

February 8, 1983. The company admitted liability to plaintiff between February 8, 1983 and June 26, 1984, the date she was actually hired.

Yellow Freight's backpay liability was tried before a magistrate. The magistrate found that plaintiff did not seek a job with any other trucking company although several trucking companies besides Yellow Freight had facilities in the general area in which plaintiff was interested in working. Each of these companies hired dock workers during the relevant time period (A-28). One of those companies, which hired several women as dock workers, regularly advertised for dock workers in the Sunday Chicago Sun-Times. Plaintiff claimed that she read the want-ads in the Sun-Times, but did not apply for any job she saw advertised (A-27).

Plaintiff obtained a part-time job as an inventory checker in December, 1982 (A-27), before the first date of Yellow Freight's potential backpay liability. She worked at this job less than 750 hours over the next 18 months. Plaintiff asked friends and neighbors about other jobs, but she did not register with the state job service. Plaintiff applied for a job with the Jewel food store where she shopped but did not apply for a job at the Dominicks food store in her neighborhood. During this period plaintiff called Yellow Freight only to be told that the company was not hiring at all, but was laying off employees. Plaintiff knew this was false as of March, 1983, but still took no action to look for a comparable position (T-33). Her only explanation was that she "was determined to get on at Yellow Freight." (T-27).

The magistrate concluded that "The amount of diligence shown by [plaintiff] in seeking work was not great."

(A-29). Stating that "the issue is close" (A-30), the magistrate relied upon the Seventh Circuit rule that working part-time satisfies the mitigation requirement. The magistrate concluded that Yellow Freight failed to carry its burden of proof that plaintiff failed to exercise reasonable diligence in securing "other employment" during the period in question (A-30).

Agreeing that the facts present a close case (A-23), the District Court adopted the magistrate's report. It rejected Yellow Freight's argument that plaintiff has an obligation to seek substantially equivalent employment. Instead, the Court held that "[t]he real question is whether a plaintiff has demonstrated a continuing commitment to be a member of the labor force." (A-24).

On appeal, the Seventh Circuit affirmed the award of backpay. Overruling its recent decision in *Brown v. Reliable Sheet Metal Works, Inc.*, 852 F.2d 932 (7th Cir. 1988), the Court of Appeals held that State courts have concurrent jurisdiction over Title VII claims. In a footnote, the Court acknowledged that its decision created a conflict with *Valenzuela v. Kraft, Inc.*, 739 F.2d 434 (9th Cir. 1984).

On the issue of mitigation, the Seventh Circuit held that Yellow Freight must prove that plaintiff was not reasonably diligent "in seeking other employment." (A-17). The Court held that when a plaintiff is denied initial employment, he or she can satisfy the mitigation requirement by "demonstrating a continuing commitment to be a member of the work force." (A-18). The Court then applied its own rule that "part-time work in another employment field satisfies the mitigation requirement." (A-18) (citations omitted). The Seventh Circuit did not address Yellow Freight's contention that plaintiff was required at least initially to seek employment substantially equivalent to the job she was denied.

REASONS FOR GRANTING THE PETITION

A. There Is A Split Among The Circuits On An Issue Of Widespread Importance As To Whether Federal Courts Have Exclusive Jurisdiction Over Title VII Claims.

Before this case, every other Court of Appeals to consider the question held that jurisdiction over Title VII claims is lodged exclusively in the federal courts. *Bradshaw v. General Motors Corp.*, 805 F.2d 110, 112 (3d Cir. 1986); *Dyer v. Greif Bros., Inc.*, 755 F.2d 1391, 1393 (9th Cir. 1985); *Valenzuela v. Kraft, Inc.*, 739 F.2d 434 (9th Cir. 1984); *Jones v. Intermountain Power Project*, 794 F.2d 546, 553 (10th Cir. 1986); *Long v. State of Florida*, 805 F.2d 1542, 1546 (11th Cir. 1986), *cert. denied*, ... U.S. ....., 108 S.Ct. 78, 98 L.Ed.2d 41 (1988). The Seventh Circuit is alone among the Courts of Appeals in its view that State courts share concurrent jurisdiction over Title VII claims.

This issue has extraordinary importance for the administration of the Civil Rights Act. Until the conflict among the circuits is resolved, there will be substantial confusion regarding the forum in which discrimination claims can be brought.[2]

---

2. According to the Administrative Office of the United States Courts, excluding prisoner petitions, there were 68,015 private civil suits asserting federal question jurisdiction filed in the federal district courts for the 12 months ending June 30, 1988. Of these, 7,169, or 10.5 percent, were civil rights employment cases. Annual Report of the Director of the Administrative Office of the United States Courts 1988, Table C 2. While some of these cases may have been filed under other civil rights statutes than Title VII, the statistics suggest that a significant portion of the workload of the federal district courts is made up of Title VII actions.

There will also be widespread and unnecessary litigation over application of claim preclusion principles to Title VII actions. In most jurisdictions, preclusion depends upon whether the "court rendering the prior judgment . . . had jurisdiction to decide the subsequent claim." *Nanavati v. Burdette Tomlin Memorial Hospital*, 857 F.2d 96 (3d Cir. 1988), *quoting Eichman v. Fotomat Corp.*, 759 F.2d 1434, 1437 (9th Cir. 1985) (Kennedy, J. concurring). Until this court resolves whether state courts have jurisdiction over Title VII claims, the lower courts will not have the guidance they need in order to apply claim preclusion principles properly.

Unless the Seventh Circuit's decision is reversed, it will disrupt the delicately balanced remedial scheme of Title VII as envisioned by Congress and interpreted by the Equal Employment Opportunity Commission.[3] When Congress considered Title VII, both the supporters and opponents understood that enforcement was to be in the federal district courts. As Senator Humphrey explained in presenting the Dirksen substitute which eventually became § 706 of the Act:

---

3. Section 706(f)(4), 42 U.S.C. § 2000e-5(f)(4), requires the chief judge of the district or the circuit "immediately to designate a judge in such district to hear and determine the case." The designated judge is required by § 706(f)(5), 42 U.S.C. § 2000e-5(f)(5), "to assign the case for hearing at the earliest practicable date and to cause the case to be in every way expedited." If the case is not scheduled for trial within 120 days after issue has been joined, the judge may appoint a master "pursuant to Rule 53 of the Federal Rules of Civil Procedure." *Id.* Under § 706(f)(2), 42 U.S.C. § 2000e-5(f)(2), injunctive relief must be issued in accordance with Rule 65. Section 706(j), 42 U.S.C. § 2000e-5(j), requires that appeals be brought as provided by 28 U.S.C. §§ 1291 and 1292. If the States have concurrent jurisdiction over Title VII actions, one must either ignore these provisions or assume that Congress intended to regulate the procedures and priorities of the state courts and administrative agencies.

> [I]f the Commission has not been able to secure voluntary compliance within 30 days . . . the Commission must so notify the person aggrieved, who may within 30 days bring his own suit in federal court for enforcement of his rights.

110 Cong. Rec. 12722 (1964). Other passages of the congressional debate, all of which were ignored by the Seventh Circuit, make it clear that Congress "preferred that the ultimate determination of discrimination rest with the Federal judiciary." H.R. Rep. 914, 88th Cong., 1st Sess. at 29 (1963) (separate views of Rep. McCulloch).

The Equal Employment Opportunity Commission is also of the view that federal courts have exclusive jurisdiction over Title VII suits. *See* amicus briefs filed by the EEOC in *McNasby v. Crown Cork & Seal Co.*, app. pending, 3d Cir. No. 88-1893, and *Pirella v. Village of North Aurora*, app. pending, 7th Cir. No. 89-1231.

By thrusting state courts into the business of adjudicating Title VII claims, the Seventh Circuit has not only violated the Congressional intent, but it has sown the seeds for years of unnecessary procedural litigation. Because of the importance of the issue to the administration of a vital federal statute, this Court should grant a writ of certiorari to resolve the conflict among the circuits as to whether federal courts have exclusive jurisdiction over Title VII claims.

B. The Decision In This Case Has Created A Split Among The Circuits Over Whether A Victim Of Employment Discrimination Must At Least Initially Seek Comparable Employment, When It Is Available, To Be Eligible For An Award Of Back Pay.

A Title VII claimant "is subject to the statutory duty to minimize damages set out in § 706(g). This duty, rooted in an ancient principle of law, requires the claimant to use reasonable diligence in finding other suitable employment." *Ford Motor Co. v. EEOC*, 458 U.S. 219, 231 (1982) (footnotes omitted). Five Courts of Appeals have held that "A Title VII plaintiff is required to mitigate damages by being reasonably diligent in seeking employment substantially equivalent to the position he or she lost." *Nord v. United States Steel Corp.*, 758 F.2d 1462, 1470 (11th Cir. 1985).[4] This line of cases is consistent with this Court's teaching that claimants are not required to take other "lesser or dissimilar work" while their claims are pending. *Ford Motor Co.*, 458 U.S. at 231 n. 14.

The Seventh Circuit, however, has created a different rule. It is one which imposes a much lighter obligation

4. *Accord,* Ford v. Nicks, 866 F.2d 865, 873 (6th Cir. 1989) (Plaintiff "was under a duty only to look for and accept employment substantially equivalent to the job from which she was discriminatorily fired."); Carden v. Westinghouse Electric Corp., 850 F.2d 996, 1005 (3d Cir. 1988) ("To cut off a back pay award, defendants must prove that the plaintiff did not exercise reasonable diligence in seeking employment substantially equivalent to the employment he lost."); Floca v. Homcare Health Services, Inc., 845 F.2d 108, 111 (5th Cir. 1988) ("The duty to mitigate requires only that the claimant accept substantially equivalent employment."); and Sangster v. United Air Lines, Inc., 633 F.2d 864, 868 (9th Cir. 1980), *cert. denied,* 451 U.S. 971 (1981).

on claimants. Under the test developed by the Seventh Circuit, it is sufficient for a Title VII claimant to be reasonably diligent merely by "seeking other employment" (A-17) without regard to whether that employment is substantially equivalent to the position that claimant lost. The Seventh Circuit is alone in its position that a plaintiff who is denied initial employment can satisfy the mitigation requirement by doing no more than "demonstrating a continuing commitment to be a member of the work force." (A-18). As a corollary principle, the Seventh Circuit holds that "part-time work in another employment field satisfies the mitigation requirement" even when the plaintiff fails to pursue equivalent full-time jobs which are available in the same area (A-18).

As this Court noted in *Ford Motor Co.*, backpay is not an automatic or mandatory remedy under § 706(g), but it is one which may be invoked in the light of sound discretion. The courts must exercise their equitable power in this area " 'in light of the large objectives of the Act' and in doing so must be guided by 'meaningful standards' enforced by 'thorough appellate review.' " 458 U.S. at 226, *quoting, Albemarle Paper Co. v. Moody*, 422 U.S. 405, 416 (1975). In addition to preventing employment discrimination, one of the large objectives of Title VII is to eliminate the "years of underemployment or unemployment" that the victims of discrimination suffer during the delays of litigation. *Ford Motor Co.*, 458 U.S. at 229. Any rule applied to the mitigation of damages which does not encourage claimants to avoid both underemployment and unemployment is not in keeping with the statutory goal. By not requiring Title VII claimants to seek substantially equivalent employment,

the rule applied by the Seventh Circuit subsidizes their underemployment and thereby "disserves Title VII's primary goal of getting the victims of employment discrimination into the jobs they deserve as quickly as possible." *Id.* at 241.

The Seventh Circuit's approach to part-time employment puts it squarely in conflict with recent decisions by both the Fifth and Sixth Circuits. In *Ford v. Nicks*, 866 F.2d 865 (6th Cir. 1989), the plaintiff had been terminated in 1973 from her position as an assistant professor of education in violation of Title VII. After 1974, she no longer pursued academic employment opportunities even though several positions were open at nearby state universities. Instead, she obtained a real estate broker's license and helped her husband, on and off, in his business. She also worked briefly for another real estate company and the Tennessee Energy Authority. These actions would clearly have met the Seventh Circuit's test that a claimant "can satisfy the mitigation requirement by demonstrating a continuing commitment to be a member of the work force." (A-18). Nevertheless, the Sixth Circuit denied plaintiff backpay, while ordering reinstatement. Applying the rule requiring a claimant to seek substantially equivalent employment, the Sixth Circuit held that plaintiff's failure to apply for available teaching positions "clearly constituted a failure to exercise reasonable care and diligence required of her . . . ." 866 F.2d at 875.

Also directly contrary to the Seventh Circuit's approach is *Johnson v. Chapel Hill Independent School District*, 853 F.2d 375 (5th Cir. 1988), in which the plaintiff had been terminated from her teaching position on the basis of race in violation of 42 U.S.C. §§ 1981 and

1983. During the period from 1980 to 1986, she did not apply for any teaching positions. The defendant presented evidence that from 1983 to 1986, there were teaching positions available in the area for which plaintiff was qualified. During these years, plaintiff was working part-time in a grocery store that she and her husband owned, although she did not draw a salary. Had the Fifth Circuit followed the Seventh Circuit's flat rule regarding part-time employment, plaintiff would have been found to have demonstrated a continuing commitment to be a member of the work force and thus to have adequately mitigated her damages. Instead, the Fifth Circuit held that the plaintiff "did not exercise reasonable diligence to minimize her damages . . . ." *Id.* at 383.

It is not disputed in this case that after being denied a job as a dock worker with Yellow Freight, plaintiff did not seek employment with any other trucking company. During the relevant time period, other trucking companies in the area were actively hiring dock workers and paying them the same wage rate under the same union contract that covered dock workers at Yellow Freight. The Seventh Circuit excused plaintiff from any obligation to apply for these jobs based on three factors. First, the Court relied upon its rule that part-time work is adequate to satisfy the mitigation requirement. As noted above, the test applied by the Seventh Circuit is not in keeping with this Court's teachings in *Ford Motor Co.* and is in conflict with the rulings of five other Courts of Appeals.[5] Second, the

---

5. It should be noted that this is not a case in which a claimant initially sought to obtain substantially equivalent employment but subsequently "lowered her sights" when further search of substantially equivalent work proved futile. *Cf.* Southern Silk Mills, Inc. v. NLRB, 242 F.2d 697, 700 (6th Cir.), *cert. denied*, 355 U.S. 821 (1957).

Court noted that plaintiff continued to inquire about a position at Yellow Freight. Indeed, the only reason plaintiff gave for not applying elsewhere for dock worker jobs was because she "was determined to get on at Yellow Freight." (T-27). The Seventh Circuit's reliance on plaintiff's continued interest in Yellow Freight puts it in conflict with the Eleventh Circuit which has held that a claimant does not satisfy the mitigation requirement by continuing to express an interest in obtaining the job previously denied. The plaintiff's duty to mitigate her damages was "not fulfilled by a readiness to accept only the job sought with the defendant. The plaintiff must be available and willing to accept substantially equivalent employment elsewhere." *Miller v. Marsh*, 766 F.2d 490, 492 (11th Cir. 1985). Finally, the Seventh Circuit found that plaintiff "continued to be assured by Mr. Casey that she would be the first person hired when a position became available." (A-18). This finding is clearly erroneous and did not receive the "thorough appellate review" required by *Ford Motor Co.*, 458 U.S. at 226.[6]

In every Title VII case, the parties must be concerned over the standard to be applied in determining whether the plaintiff has adequately mitigated his or her damages.

---

6. Rather than receiving encouraging responses that she would soon be hired, plaintiff testified to exactly the opposite (T-33):

> The Court: I had two questions. When you would call—I have forgotten his name.
>
> The Witness: Mr. Casey.
>
> The Court: Mr. Casey during all this time, what would he say to you?
>
> The Witness: He would say to me that they weren't hiring at all; that he was laying off.

Plaintiff knew that this information was false as of March, 1983, but still failed to seek comparable work elsewhere until June 26, 1984, when she was hired by Yellow Freight (T-33).

"The question has considerable practical significance because of the lengthy delays that often attend Title VII litigation." *Ford Motor Co.*, 458 U.S. at 221 (footnote omitted). In light of the importance of the issue and the fact that the circuits are split, this is an appropriate case for this Court to establish a "meaningful standard" for the guidance of the lower courts. *Id.* at 226.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

JEFFREY IVAN PASEK
(Counsel of Record)
ALAN M. LERNER
COHEN, SHAPIRO, POLISHER,
SHIEKMAN AND COHEN
12 South 12th Street
Philadelphia, Pennsylvania 19107
(215) 922-1300

STEVEN J. TEPLINSKY
LEONARD R. KOFKIN
FAGEL, HABER & MARAGOS
140 South Dearborn, Suite 1400
Chicago, Illinois 60603
(312) 346-7500

Attorneys for Petitioner

Of Counsel:
RONALD E. SANDHAUS
10990 Roe Avenue
Overland Park, Kansas 66207
(913) 345-3000

APPENDIX

APPENDIX 1

(Decided April 28, 1989)

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Nos. 88-1733 and 88-1797

COLLEEN DONNELLY,
Plaintiff-Appellee,
Cross-Appellant,

v.

YELLOW FREIGHT SYSTEM, INC.,
Defendant-Appellant,
Cross-Appellee.

Appeal from the United States District Court for the
Northern District of Illinois, Eastern Division.
No. 85 C 7195—James B. Moran, *Judge*.

ARGUED DECEMBER 2, 1988—DECIDED APRIL 28, 1989[1]

Before BAUER, *Chief Judge*, CUMMINGS, and EASTERBROOK, *Circuit Judges*.

1. Pursuant to Circuit Rule 4000, this opinion has been circulated to all the active members of the court because it overrules *Brown v. Reliable Sheet Metal Works, Inc.*, 852 F.2d 932 (7th Cir. 1988), and creates a conflict with *Valenzuela v. Kraft, Inc.*, 739 F.2d 434 (9th Cir. 1984). No judge in regular active service has requested a hearing *en banc*.

BAUER, *Chief Judge*. This case is before us on appeal from a judgment by the district court entered in favor of plaintiff, Colleen Donnelly. Plaintiff brought suit against her employer, defendant Yellow Freight System, Inc., on charges of sex discrimination pursuant to Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e *et seq*. For the following reasons, we affirm the district court's decision on all issues, except the court's order denying an award of prejudgment interest.

I.

Donnelly applied for a dock-worker position at Yellow Freight on October 26, 1982. Although Yellow Freight was not hiring at the time, Neil Casey, the terminal manager, told her that when Yellow Freight began hiring again, Donnelly would be the next dock worker hired. About the same time, Donnelly also applied for jobs at Jewel Food Stores and Retail Inventory Service Co. (RIS). In December of 1982, RIS hired Donnelly on a part-time basis and she worked there through June of 1984.

Despite securing a job at RIS, Donnelly called Casey weekly to inquire about job openings at Yellow Freight. Although Yellow Freight began hiring dockworkers again in February of 1983, Casey not only continued to tell Donnelly that Yellow Freight was not hiring, but also falsely reported that Yellow Freight was laying off dockworkers. Eighteen months later, Donnelly was finally hired by Yellow Freight.

In March of 1985, Donnelly filed charges with the Equal Employment Opportunity Commission (EEOC). In her first charge she alleged that the defendant discriminated against her on the basis of sex by failing to offer her employment as a dock worker. In her second charge

she alleged that the defendant discriminated against her on the basis of sex subsequent to her hiring at Yellow Freight. (This charge was later dismissed on summary judgment and no appeal was taken.) On March 15, plaintiff received a Notice of Right to Sue Within 90 Days from the EEOC.

On May 22, 1985, within the 90-day limitation period, plaintiff filed a two-count complaint against the defendant in the Circuit Court of Cook County, alleging sex discrimination in violation of the Illinois Human Rights Act (IHRA), Ill. Rev. Stat. ch. 68, ¶ 1-1-1 *et seq*. (1983). On June 28, 1985, defendant filed a motion to dismiss plaintiff's complaint for failure to exhaust state administrative remedies as required by the IHRA. On July 17, Donnelly sought leave to file an amended complaint, appending proposed Counts III and IV. Counts III and IV realleged the same facts as in Counts I and II of the original complaint but were premised under Title VII. Although Donnelly had not yet filed the motion to amend her complaint, Yellow Freight objected to the proposed motion. On August 9, Donnelly actually filed her motion to amend the complaint. On the same date, the circuit court entered an agreed order dismissing her original complaint with prejudice and continuing her contested motion for leave to file an amended complaint. This order essentially resulted in a lawsuit without a complaint. For a discussion of the problems attending the agreed order, see n.10, *infra*.

On August 14, 1985, Yellow Freight filed a petition to remove the case to the United States District Court. The district court granted Donnelly's motion to file an amended complaint on September 13, and the complaint was filed on September 20. Yellow Freight moved to dismiss the complaint on the grounds that it was filed more than 90

days after the EEOC issued the right to sue letter. The court denied the defendant's motion.

On November 3, 1987, the case was tried before a United States magistrate pursuant to the consent of the parties. *See* 28 U.S.C. § 636(c). Because Yellow Freight admitted liability for sex discrimination, only the issues of back pay and mitigation of damages were tried. The magistrate concluded that Donnelly had exercised reasonable diligence in her search for other employment and awarded her damages equal to the amount she would have earned had she been hired by Yellow Freight on February 8, 1983, less her wages earned at RIS. The magistrate also found that plaintiff was entitled to salary increases adopted at Yellow Freight during the eighteen-month period in which she was not hired, and that she was entitled to pension fund contributions and prejudgment interest. The district court adopted the magistrate's recommendations and findings, except that it did not award prejudgment interest to the plaintiff.

Yellow Freight then brought this appeal. First, Yellow Freight alleges that the 90-day limitations period within which to filed a Title VII complaint expired before Donnelly filed her federal claim. Second, Yellow Freight alleges that the district court abused its discretion in finding that Donnelly acted with reasonable diligence to mitigate her damages. On cross-appeal, Donnelly argues that the district court abused its discretion by failing to award her prejudgment interest. We reject both of Yellow Freight's arguments and we agree with Donnelly's contention that she is entitled to prejudgment interest.

II.

Before reaching the merits of this case, we first must decide whether Donnelly's Title VII cause of action was timely filed. In order to bring the action, Donnelly had to file suit against Yellow Freight within 90 days of the issuance of the EEOC's Notice of Right to Sue. Although Donnelly filed her state claim in state court within the 90-day window, she did not file her Title VII claim in federal court within the requisite time period. Yellow Freight's first argument is that any filing in state court, whether before or after the close of the 90-day window, cannot toll the limitation period because Title VII jurisdiction is exclusively federal. Therefore, defendant continues, plaintiff did not effectively file her complaint until she filed it in federal court on September 20, 1985, which was more than six months after the EEOC issued the Notice of Right to Sue. Second, defendant argues that even if federal and state courts share jurisdiction over Title VII claims, plaintiff's amended claim does not relate back to her original claim because her original complaint was brought under the IHRA.

A.

Unless Congress includes in the statute an explicit statement vesting jurisdiction exclusively in federal court, state courts may presume that they share jurisdiction concurrently with the federal courts over a federal cause of action. *Gulf Offshore Co. v. Mobil Oil Corp.*, 453 U.S. 473, 477-78 (1981). This is a presumption deeply imbedded in the history of our federal system. *See* The Federalist No. 82 (A. Hamilton). Because federal courts are courts of limited jurisdiction, *see Sheldon v. Sill*, 1 How. 441 (1850) state courts must stand ready to vindicate federal rights, subject to review by the Supreme Court, should Congress

decide not to confer jurisdiction upon the federal courts to hear a particular federal claim. *See Gulf Offshore*, 453 U.S. at 478 n.4 (*citing Martin v. Hunter's Lessee*, 1 Wheat 304, 346-48 (1816)). The presumption in favor of concurrent jurisdiction may be rebutted only by an "unmistakable implication (of exclusive jurisdiction) from legislative history," *id.* at 478 (*citing California v. Arizona*, 440 U.S. 59, 66-68 (1979)), or by a "disabling incompatibility between the federal claim and state-court adjudication." *Id.* at 477-478 (*citing Charles Dowd Box Co. v. Courtney*, 368 U.S. 502, 507-508 (1962); *see also Claflin v. Houseman*, 93 U.S. 130, 136 (1876)).

Because Congress failed to address this issue explicitly, Yellow Freight urges us to find that the presumption of concurrent jurisdiction is not applicable to Title VII and that the circumstances warrant a finding of exclusive federal jurisdiction. In so doing, Yellow Freight asks us to adopt the Ninth Circuit's conclusion in *Valenzuela v. Kraft, Inc.*, 739 F.2d 434 (9th Cir. 1984), and hold that both the statutory language and the legislative history of Title VII raise the unmistakable implication of exclusive federal jurisdiction.[2] *See also Bradshaw v. General Motors Corp.*, 805 F.2d 110, 112 (3rd Cir. 1986) (Title VII jurisdiction is exclusively federal);[3] *Dickinson v. Chrysler Corp.*, 456 F. Supp. 43 (E.D. Mich. 1978) (same). *But see*

2. In reaching its conclusion, the *Valenzuela* court also relied on dictum from the Supreme Court's opinion in *Lehman v. Nakshian*, 453 U.S. 156, 164 n.12 (1981). However, the *Lehman* dictum concerned the allocation of jurisdiction in favor of the federal district courts and to the exclusion of the Court of Claims. As such, it does not lend support to the Ninth Circuit's conclusion.

3. Although the *Bradshaw* court stated that Title VII jurisdiction was exclusively federal, it provided no reasoning to support its conclusion. Therefore, we do not find this case to be persuasive authority.

Bennum v. Board of Governors of Rutgers, 413 F. Supp. 1274 (D. N.J. 1976) (Title VII jurisdiction is concurrent); *Greene v. County School Bd.*, 524 F. Supp. 43 (E.D. Va. 1981) (same).[4]

We decline the invitation to join in the conclusion of the *Valenzuela* court. The *Valenzuela* court found Congress' grant of jurisdiction to the federal district courts, *see* 42 U.S.C. § 2000e-5(f)(3) ("[e]ach United States district court . . . shall have jurisdiction of actions brought under this subchapter"), and the accompanying procedural directives,[5] to be a persuasive indication of exclusive federal jurisdiction. However, "the mere grant of jurisdiction to a federal court does not operate to oust a state court from concurrent jurisdiction over the cause of action." *Gulf Offshore*, 453 U.S. at 479 (*citing United States v. Bank of New York & Trust*, 296 U.S. 463 (1936)). *See also Charles Dowd*, 368 U.S. at 506; *Galveston, H. & S.A.R. Co. v. Wallace*, 223 U.S. 481 (1912). Moreover, the legislative history of Title VII does not persuade us that Congress intended jurisdiction over the statute be exclusively federal. The *Valenzuela* and *Dickinson* courts found it significant that the history con-

4. This circuit has yet to squarely address whether jurisdiction over actions brought pursuant to Title VII is exclusively federal. However, the reasoning of an earlier decision of this circuit, *Brown v. Reliable Sheet Metal Works, Inc.*, 852 F.2d 932 (7th Cir. 1988), assumes that Title VII jurisdiction is exclusively federal. We now overrule the *Brown* decision. For a further discussion of *Brown* see *infra*.

5. *See* 42 U.S.C. §20005-5(j) ("Any civil action brought under this section . . . shall be subject to appeal as provided in sections 1291 and 1292, Title 28") (Sections 1291 and 1292 govern the jurisdiction of the United States Court of Appeals). *See also* 42 U.S.C. §2000e-5(f)(2) ("any temporary restraining order or other order granting preliminary or temporary relief shall be issued in accordance with Rule 65 of the Federal Rules of Civil Procedure").

tained references to federal courts but not to state courts.[6] *Valenzuela*, 739 F.2d at 436 (*quoting Dickinson*, 456 F. Supp. at 46). But because Congress has the power to grant or deny jurisdiction to the federal district courts, the only significance that can be garnered from these references is that Congress intended to grant jurisdiction to the federal courts.

On the other hand, the logical consequences of other passages from the legislative history lead to the conclusion that jurisdiction over Title VII is shared between the state and federal courts. Title VII was never intended to be the exclusive remedy for employment discrimination. *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 48-49 (1974); *see also* 110 Cong. Rec. 7207 (1964); Interpretive Memorandum of Senators Clark and Case, 110 Cong. Rec. 7214 (1964). In addition to recognizing the force of other laws designed to combat employment discrimination, Congress also wanted to encourage resort to state employment discrimination laws. *See* 110 Cong. Rec. 12707, 13081, 13087. An examination of the principles of res judicata and collateral estoppel applicable to Title VII actions reveals that this intent would be frustrated if jurisdiction over Title VII was exclusively federal. Title 28 U.S.C. § 1738 requires federal courts to afford the same full faith and credit to state court judgments that would apply in the state's own courts. Thus federal courts must give preclusive effect to a previous state court judgment under state employment dis-

6. The 1963 House Report states that "the district courts of the United States . . . are given jurisdiction of actions brought under this title." H.R. Rep. No. 914, 88th Cong., 1st Sess. 29 (1963), *reprinted in* 1964 U.S. Code Cong. & Ad. News 2355, 2405; *accord* H.R. Rep. No. 238, 92nd Cong., 1st Sess. 12 (1971); *reprinted in* 1972 U.S. Code Cong. & Ad. News 2137, 2147.

crimination laws. *Kremer v. Chemical Construction Corp.*, 456 U.S. 461 (1982); *Wakeen v. Hoffman House, Inc.*, 724 F.2d 1238 (7th Cir. 1983); *Unger v. Consolidated Foods Corp.*, 693 F.2d 703 (7th Cir. 1982), *cert. denied*, 460 U.S. 1192 (1983). If Title VII jurisdiction was exclusively federal, a plaintiff would have to bring suit in federal court to preserve all available remedies for employment discrimination. Such a situation effectively precludes state court adjudication of state-created rights, thereby discouraging the creation and development of state employment discrimination laws, contrary to Congressional intent.

Although there is little in the legislative history of Title VII to rebut the presumption of concurrent jurisdiction, we must also examine whether there exists a "disabling incompatibility" arising from state court adjudication of a Title VII claim. To resolve this question, the Supreme Court has suggested an examination of such factors as the desirability of uniform interpretation of the statute, the expertise of federal judges in federal law, and the assumed greater hospitality of federal courts to peculiarly federal claims. *Gulf Offshore*, 453 U.S. at 483-84. *See also* Redish & Muench, *Adjudication of Federal Causes of Action in State Court*, 75 Mich. L. Rev. 311, 329-35 (1976); Note, *Exclusive Jurisdiction of Federal Courts in Private Civil Actions*, 70 Harv. L. Rev. 509, 511-15 (1957). We find that none of these factors compels a finding of exclusive federal jurisdiction.

There is no reason to believe that concurrent jurisdiction will lead to the arbitrary development of Title VII law. There already exists a great volume of Title VII law developed by the Supreme Court and lower

federal courts and the states are bound by the Supremacy Clause to follow federal law.[7] Although it is true that at this point in time federal judges may have developed greater expertise with respect to Title VII claims, there is no reason to presume state courts are not competent to adjudicate these issues. Such a notion overlooks the obvious; most states have enacted employment discrimination laws, which are routinely litigated in state courts, and state court judges are accordingly quite familiar with discrimination issues.

In addition, we find no basis for the assumption that state courts might not faithfully enforce Title VII. Given that state courts exercise concurrent jurisdiction over civil rights actions brought under 42 U.S.C. § 1983, *Martinez v. California*, 444 U.S. 277 n.7 (1980), it is hard to imagine that state courts would not be hostile to section 1983 actions, but would be hostile to Title VII actions. Similar, although not identical, policy issues underlie both statutes. Second, most states have enacted employment discrimination laws. Whether enacted by state government or federal government, the same policy issues underlie employment discrimination laws. Thus from a theoretical viewpoint, state courts are as amenable to Title VII claims as federal courts. In addition, any concern either party may have over the fairness of the forum is easily remedied. A plaintiff can file the

7. Even when federal law is not clearly developed or preempts state law, jurisdiction may be exercised concurrently. For example, even though §301(a) of the Labor Management Relations Act of 1947, 29 U.S.C. §185, authorizes federal courts to fashion a body of federal law for the enforcement of collective bargaining agreements, *Textile Workers v. Lincoln Mills*, 353 U.S. 448 (1957), state courts exercise jurisdiction over claims brought under §301(a) concurrently with the federal courts. *See Charles Dowd*, 368 U.S. 502.

complaint in federal court and a defendant can remove the complaint to federal court.[8]

Finally, we find support for our conclusion that the state courts have concurrent jurisdiction with the federal courts over Title VII actions from Congress' decision to vest state courts with concurrent jurisdiction over claims brought under the Age Discrimination in Employment Act of 1967 ("ADEA"), a statute predicated upon Title VII in many ways. *See* 29 U.S.C. § 626(c)(1) ("[a]ny person aggrieved may bring a civil action in any court of competent jurisdiction for such legal or equitable relief as will effectuate the purposes of this chapter . . .").[9] *See also Lehman v. Nakshian*, 453 U.S. 156, 164 n.12 (1981). Both statutes seek to eradicate the evil of employment discrimination based upon membership in an identifiable group. Whereas Title VII is aimed at ending discrimination based upon race, color, religion, sex or national origin, the ADEA is directed toward ending discrimination based upon age. The prohibitions of the

8. The opportunity to exercise removal jurisdiction also explains some Supreme Court dictum which seems to suggest that Title VII jurisdiction is exclusively federal. *See, e.g., Alexander*, 415 U.S. at 47 (lists state and local agencies, and federal courts, but not state courts as forums for enforcement); *Kremer*, 456 U.S. at 468 (federal courts are "entrusted with ultimate enforcement responsibility" over Title VII actions).

9. Title VII, on the other hand, provides that the United States district courts shall have jurisdiction over claims brought under the Act. Because the enforcement provisions of the ADEA, 29 U.S.C. §626, incorporate by reference most of the enforcement provisions of the Fair Labor Standards Act of 1938 ("the FLSA"), 29 U.S.C. § 201 *et seq.*, we do not find the different jurisdictional language of Title VII and the ADEA significant. Among other things, the FSLA provides that an aggrieved person may bring an action in any court of competent jurisdiction. 29 U.S.C. § 216(b). Thus the different jurisdictional language is not the conscious result of an attempt to differentiate between jurisdiction over the ADEA and Title VII, but rather the result of the specific enforcement provisions of the FLSA.

ADEA generally follow those of Title VII and courts have relied on precedent under Title VII to interpret comparable ADEA provisions. *See, e.g., Hodgson v. First Fed. Sav. & Loan Ass'n,* 455 F.2d 818, 820 (5th Cir. 1972) ("[w]ith a few minor exceptions the prohibitions of this enactment are in terms identical to those of Title VII . . . except that 'age' has been substituted for 'race, color, religion, sex or national origin' "). Commentators describe the ADEA as a hybrid of Title VII and the Fair Labor Standards Act of 1938 ("FLSA"): the substantive provisions are drawn from Title VII, but the remedies are those of the FLSA. *See* B. Schlei & P. Grossman, *Employment Discrimination Law* 485 (1983). To prove an ADEA claim, plaintiffs generally proceed under a disparate treatment theory (although in rare circumstances a disparate impact claim may be brought). The order and allocation of evidentiary burdens, and the standards of proof set forth in *McDonnell Douglas Corp. v. Green,* 411 U.S. 792 (1973), a Title VII disparate treatment case, apply to claims brought under the ADEA. *See* Schlei & Grossman at 497-504. Given the extensive similarities between the two statutes, and the fact that state courts have jurisdiction over private-sector ADEA claims, it seems incongruous to assume that state courts are incompetent to adjudicate Title VII claims.

As an alternative to its attempt to overcome the presumption of concurrent jurisdiction, Yellow Freight contends Illinois courts do not have jurisdiction to hear federal Title VII claims as a matter of Illinois state law. For this unique proposition, Yellow Freight relies on the Illinois Supreme Court's decision in *Mein v. Masonite Corp.*, 109 Ill. 2d 1, 485 N.E. 2d 312 (1985). In *Mein*, the plaintiff alleged that he was wrongfully discharged

from his job in violation of Illinois public policy. Because the plaintiff failed to allege a violation of the Illinois Human Rights Act (the IHRA), the Illinois Supreme Court dismissed his complaint for failure to state a cause of action. In reaching its conclusion, the court stated that the Illinois "courts have no jurisdiction to hear independent actions for civil rights violations." *Mein,* 485 N.E. 2d at 315. Drawing upon this dictum, Yellow Freight argues that, at least in Illinois, state courts do not provide a forum for Title VII litigation and therefore jurisdiction lies exclusively with the federal courts.

We must reject this argument. Even if the *Mein* court did, in fact, intend to exclude Title VII claims from the Illinois courts,[10] neither the Illinois courts nor legislature have the power to close state court doors to federal causes of action. When presented with a federal claim over which concurrent jurisdiction exists, state courts are under a "duty to exercise (jurisdiction)" over the federal claim. *Mondou v. New York, N.H. & H.R.R.*, 223 U.S. 1, 58 (1912) (state courts required to hear actions arising under the Federal Employers Liability Act); *Testa v. Katt,* 330 U.S. 386 (1947) (state courts must hear actions arising under the Emergency Price Control Act). *Cf. Palmore v. United States,* 411 U.S. 389, 402 (1973) ("this court unanimously held (in *Testa*)

---

10. Yellow Freight reads the *Mein* decision too broadly. At issue in *Mein* was whether the plaintiff could bring a state action, independent of the IHRA, for human rights violations. The court responded "(i)t is clear that the legislature intended the (IHRA), with its comprehensive scheme of remedies and administrative procedures, to be the exclusive source for redress of alleged human rights violations . . . the legislature intended . . . to avoid direct access to the courts for redress of civil rights violations." *Mein,* 485 N.E.2d at 315. The only issues before the *Mein* court were the scope and intent of the IHRA; the court did not purport to address issues of federal law.

that Congress could constitutionally require state courts to hear and decide Emergency Price Control Act cases involving the enforcement of federal penal laws"). *But see Brown v. Gerdes*, 321 U.S. 178, 188 (1944) (only law-making power of the State of New York has power to confer jurisdiction upon the New York state courts; Congress does not have this power). *See generally*, Redish & Muench, *supra*. Once Congress has vested jurisdiction over a federal claim in the state courts, the state courts, including the courts of Illinois, are under a constitutional obligation to exercise jurisdiction.

We must address one final point. Donnelly did not exhaust her state administrative remedies before filing her state law claim in state court. In *Brown v. Reliable Sheet Metal Works, Inc.*, 852 F.2d 932, 934-35 (7th Cir. 1988), this court held that a state court filing did not toll the Title VII 90-day filing period because the plaintiff did not exhaust her state administrative remedies. On the basis of *Felder v. Casey*, ... U.S. ....., 108 S. Ct. 2303 (1988), we now overrule *Brown*. In *Felder*, the Supreme Court held that a plaintiff who filed a section 1983 action in state court did not have to comply with the state's notice of claim statute because the state statute conflicted both in purpose and effect with the remedial objectives of section 1983 and because enforcement of the statute would produce different outcomes based solely upon whether the claim was asserted in state or federal court. Similar concerns are applicable here. This is not to say that a state could not impose an exhaustion requirement for claims based entirely on state law but here, of course, the foundation was Title VII and plaintiff complied with her requirement under that statute. Thus Donnelly's failure to exhaust her state

administrative remedies does not defeat the tolling effect of her state court filing upon Title VII's 90-day window.

Because we find that jurisdiction over Title VII claims is vested in both state and federal court, we reject Yellow Freight's argument that the state court filing did not toll the 90-day statute of limitations.

B.

Yellow Freight next argues that even if there exists concurrent jurisdiction, plaintiff's complaint was not timely filed because her amended complaint, filed in federal court and alleging Title VII violations, does not relate back to her original complaint, filed in state court and alleging state law violations. Defendant claims that it did not have notice of the Title VII claims because the original complaint only alleged violations of the IHRA.

Yellow Freight misconstrues the standard by which an amended complaint is deemed to relate back to the date of the original complaint for the purposes of tolling the statute of limitations. Under Federal Rule of Civil Procedure 15(c), an amended complaint relates back to the date of the original pleading "whenever the claim . . . asserted in the amended pleading arose out of the conduct, transaction or occurrence set forth . . . in the original pleading." Contrary to defendant's assertion, the same substantive legal theory need not be alleged in both complaints; rather the claims need only arise out of the same "conduct, transaction or occurrence." Because the Title VII and IHRA claims are based upon identical facts and circumstances, plaintiff's amended complaint clearly relates back to the date of the original complaint.

The only problem with the above analysis is that the original complaint was dismissed before the amended complaint was filed. If we adhere to the terms of the agreed order entered by the state circuit court, there is no original complaint to which the amended complaint could relate back. However, the agreed order, drafted by the parties, utterly makes no sense.[11] Because of this and because Yellow Freight will suffer no prejudice, we refuse to adhere to the literal consequences of the order. Any claim of prejudice by Yellow Freight is disingenuous. Yellow Freight received notice that an employment discrimination claim was pending against it when plaintiff filed her state court claim in state court. *See Sessions v. Rush State Hospital*, 648 F.2d 1066, 1070 (5th Cir. 1981) ("[s]o long as the Title VII claim is based on the discrimination originally charged in the complaint, allowing it to relate back . . . works no hardship on the defendant for the original complaint furnished adequate notice of the nature of the suit"). Second, in view of the fact that the order continued the plaintiff's contested motion, Yellow Freight cannot now argue that it thought that the threat of litigation had passed upon entry of the agreed order. Yellow Freight also sought removal of the lawsuit after

11. Under the agreed order, plaintiff's original complaint was dismissed with prejudice, but her motion to file an amended complaint was continued. Problems abound in this order. To begin with, the original complaint should not have been dismissed with prejudice. The complaint was dismissed because plaintiff failed to exhaust her administrative remedies; in such a circumstance, the proper remedy is to dismiss the complaint *without prejudice*. Second, once the original complaint was dismissed, there was no point in continuing plaintiff's motion to file an amended complaint. The amended complaint would have nothing to amend. Further, a future complaint alleging Title VII violations would have been barred by the doctrine of res judicata because the original complaint alleging IHRA violations was dismissed *with prejudice*.

the agreed order was entered.[12] For these reasons, we find the plaintiff's amended complaint relates back to the filing date of the original complaint and thus was timely filed.

III.

We may now address the substantive issues raised on this appeal. As already mentioned, Yellow Freight admitted liability and only the issue of damages was tried before the magistrate. Yellow Freight contends that the damage award should be reversed because Donnelly failed to exercise reasonable diligence in mitigating her damages. Title VII provides that "[i]nterim earnings or amounts earnable with reasonable diligence by the person or persons discriminated against shall operate to reduce the back pay otherwise allowable." 42 U.S. § 2000e-5(g). The district court adopted the magistrate's finding that Donnelly did, in fact, exercise reasonable diligence. This court is bound by the district court's award of damages unless that determination is clearly erroneous. *Albemarle Paper Co. v. Moody*, 422 U.S. 405 (1975); *United States v. City of Chicago*, 853 F.2d 572, 578 (7th Cir. 1988).

Because a plaintiff's failure to mitigate damages is an affirmative defense, the employer bears the burden of proof on this issue. *Wheeler v. Snyder Buick, Inc.*, 794 F.2d 1228, 1234 (7th Cir. 1986). In order to succeed on its claim, Yellow Freight must prove that Donnelly was not reasonably diligent in seeking other employment, and that with the exercise of reasonable diligence there was a

12. This removal was defective because at the time of removal there was nothing to remove. Although removal was improper, this court is not deprived of jurisdiction because the district court actually had jurisdiction over the amended complaint alleging Title VII violations. *See Grubbs v. General Electric*, 405 U.S. 699 (1972).

reasonable chance the employee might have found comparable employment, the earnings of which would offset any damages awarded. *Id.* Yellow Freight contends that Donnelly's part-time employment with RIS does not demonstrate reasonable diligence. We disagree.

When a plaintiff is denied initial employment, he or she can satisfy the mitigation requirement by demonstrating a continuing commitment to be a member of the work force. This circuit has held previously that part-time work in another employment field satisfies the mitigation requirement. *See, e.g., Wheeler,* 794 F.2d 1228, *Orzel v. City of Wauwatosa,* 697 F.2d 743 (7th Cir. 1983), *cert. denied,* 464 U.S. 992 (1983); *Sprogis v. United Airlines, Inc.,* 517 F.2d 387 (7th Cir. 1975). Not only did Donnelly accept a part-time job with RIS, she continued to inquire about a position at Yellow Freight and continued to be reassured by Mr. Casey that she would be the first person hired when a position became available. On the basis of these facts, the district court's award of damages was not clearly erroneous and so stands.

The last issue left to decide is whether Donnelly is entitled to prejudgment interest on her damage award. The decision to grant or deny an award of prejudgment interest lies within the discretion of the district court. *Taylor v. Philips Industries, Inc.,* 593 F.2d 783, 787 (7th Cir. 1979). In this case, the district court denied the magistrate's award of prejudgment interest because the issue of plaintiff's diligence was "close." Whether or not an award of interest should be granted turns upon whether the amount of damages is easily ascertainable, not whether the issue of mitigation was "close." *See, e.g., Domingo v. New England Fish Co.,* 727 F.2d 1429, 1446, *modified,* 742 F.2d 520 (9th Cir. 1984); *Behlar v. Smith,* 719 F.2d 950,

954 (8th Cir. 1983), *cert. denied sub nom. Univ. of Arkansas Bd. of Trustees v. Greer,* 466 U.S. 958 (1984); *EEOC v. Wooster Brush Co.,* 727 F.2d 566, 578 (6th Cir.), *cert. denied,* 467 U.S. 1241 (1984). Refusal to award interest based upon the reasoning articulated by the district court is an abuse of discretion. *See Hanna v. American Motors Corp.,* 724 F.2d 1300, 1311 (7th Cir. 1984) (district court's refusal to award prejudgment interest because liability question was "close" was an abuse of discretion). Because Colleen Donnelly's damages were readily ascertainable, the district court should have awarded her prejudgment interest on her damage award.

The decision of the district court is affirmed in all respects except that the matter is returned to the district court with the direction to enter an order granting Donnelly appropriate prejudgment interest.

Affirmed in part, remanded for action consistent with this opinion.

A true Copy:

Teste:

.....

Clerk of the United States Court of Appeals for the Seventh Circuit

APPENDIX 2

(Dated July 17, 1989)

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
CHICAGO, ILLINOIS 60604
July 17, 1989.

Before
Hon. WILLIAM J. BAUER, Chief Judge
Hon. WALTER J. CUMMINGS, Circuit Judge
Hon. FRANK H. EASTERBROOK, Circuit Judge

No. 88-1733
88-1797

COLLEEN DONNELLY,
Plaintiff-Appellee,
Cross-Appellant,

vs.

YELLOW FREIGHT SYSTEM, INC.
Defendant-Appellant,
Cross-Appellee.

Appeal From the United States District Court for the
Northern District of Illinois, Eastern Division.
No. 85 C 7195, James B. Moran, *Judge*.

ORDER

On consideration of the petition for rehearing and suggestion for rehearing *en banc* filed in the above-titled cause by the defendant-appellant, cross-appellee, no judge

in regular active service has requested a vote on the suggestion for rehearing, and all of the judges on the original panel have voted to deny rehearing. Accordingly,

IT IS ORDERED that the aforesaid petition for rehearing be, and the same is hereby DENIED.

APPENDIX 3

(Dated March 17, 1988)

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

CASE NUMBER: 85 C 7195

COLLEEN DONNELLY

v.

YELLOW FREIGHT SYSTEMS, INC.

JUDGMENT IN A CIVIL CASE

☐ Jury Verdict. This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

[X] Decision by Court. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

That we award basic backpay in the amount of $27,-656.61, retroactive seniority from February 8, 1983, $4,800.00 in resulting additional wages, pension contributions of $3,976.00 (plus any penalties or interes required by the Funds), attorney's fees of $21,876.00 and $718.72 in costs. (See Memorandum and Order dated 3-17-88)

H. Stuart Cunningham
Clerk
/s/ Willie A. Haynes
Willie A. Haynes
(*By*) *Deputy Clerk*

Date March 17, 1988

APPENDIX 4

(Dated March 17, 1988)

IN THE
UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

No. 85 C 7195

COLLEEN DONNELLY,
Plaintiff,

vs.

YELLOW FREIGHT SYSTEMS, INC.,
Defendant.

MEMORANDUM AND ORDER

Magistrate Bucklo, in this action where sex discrimination was conceded, awarded backpay of $27,656.61, prejudgment interest and other relief, together with fees and costs. Defendant objects to the award, contending that it is clearly erroneous to find that plaintiff exercised reasonable diligence in seeking other employment. The magistrate thought it was a close case. This court concurs, but we do not believe that the finding is clearly erroneous or that the award of backpay is an abuse of discretion.

Central to defendant's objections is the view that a plaintiff has an obligation to seek substantially equivalent employment, and that is not quite so. A plaintiff does not have an obligation to seek demeaning, distasteful or inferior employment, but she cannot sit idly by if substantially equivalent employment is readily available,

Sangster v. United Air Lines, Inc., 633 F.2d 864, 868 (9th Cir. 1980). That does not mean, however, that a plaintiff necessarily has failed to mitigate damages because she chooses to set her sights somewhat lower and seeks employment not as remunerative as the position from which she was excluded. The real question is whether a plaintiff has demonstrated a continuing commitment to be a member of the labor force. It is unlikely that defendant would have objected to the award if plaintiff had obtained full-time employment as an inventory-taker and was suing only for the wage differential. That alternate employment is mitigation, and a discriminatory employer cannot use the concept that a plaintiff need not seek a lesser job to penalize one who did.

Defendant's real objection is that plaintiff's efforts to obtain a dockworker position at some other company were modest at best, even though such positions were available, and she did not obtain full-time alternate employment. Plaintiff occasionally checked want ads and occasionally inquired of friends. There were other companies in the locality which employed dockworkers, but she did not directly approach them and she did not use available agency resources.

But those were not the extent of plaintiff's efforts. She called defendant often and, the record indicates, received periodic assurances that she would be hired. Defendant gave her reason to believe that employment with that company was just over the horizon and in the meantime she took a part-time job. Each inquiry demonstrated a commitment to the labor force, each rejection (when defendant was in fact employing) was a separate discrimination, and the encouraging responses provided some justification for not going elsewhere. A plaintiff cannot

insist upon a specific position at a specific company. That means that a plaintiff cannot once be rejected, file a charge and sit at home until her charge is resolved. Such, however, were not the circumstances of this case.

We do, however, agree with the defendant in one respect. In one short paragraph the magistrate noted that plaintiff sought prejudgment interest and that such an award is discretionary, and then, without discussion, awarded interest. Once having concluded that plaintiff's diligence "was not great" and that the issue was "close," the magistrate, we believe, should not have awarded prejudgment interest. We otherwise overrule the objections and award basic backpay in the amount of $27,656.61, retroactive seniority from February 8, 1983, $4,800.00 in resulting additional wages, pension contributions of $3,976.00 (plus any penalties or interest required by the Fund), attorney's fees of $21,876.00 and $718.72 in costs.

/s/ James B. Moran
James B. Moran
Judge, United States District Court

March 17, 1988.

APPENDIX 5

(Dated December 10, 1987)

IN THE
UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT
OF ILLINOIS
EASTERN DIVISION

No. 85 C 7195

COLLEEN DONNELLY,
Plaintiff,

v.

YELLOW FREIGHT SYSTEMS, INC.,
Defendant.

REPORT AND RECOMMENDATION OF MAGISTRATE ELAINE E. BUCKLO

This Title VII case was referred to me for trial pursuant to 42 U.S.C. §2000e-5(f)5 and the consent of the parties. Prior to trial, defendant Yellow Freight Systems, Inc. ("Yellow Freight") conceded liability. The case was tried on the issues of back pay, retroactive seniority and other benefits on November 3, 1987.

I. *Findings of Fact*

Federal jurisdiction is based on 42 U.S.C. §2000(e)-5(q).

Plaintiff Colleen Donnelly ("Donnelly") moved to Chicago Ridge, Illinois in June, 1982. She was married and had two children under five years of age. Her home is four blocks from Yellow Freight's Chicago Ridge facility.

Donnelly wanted to work after her move. A neighbor told her that Yellow Freight was hiring dock workers and that it was a good company. Donnelly's father was a truck driver and she is a large woman, capable of loading and unloading heavy materials. She contacted Yellow Freight, filled out an application dated October 26, 1982 and had an interview with the terminal manager, Neil Casey. He told her the company was not hiring but that she would be the first person hired when the situation changed. In fact, beginning in February 8, 1983, Casey hired numerous persons, all male. Not until Donnelly filed a complaint with the EEOC did Casey hire her, on June 26, 1984.

During the period Donnelly was waiting to be hired by Yellow Freight she called Casey often. Each time he told her that Yellow Freight was not yet hiring, that the company was laying off workers, but that she should keep calling.

Donnelly also read the Sunday Chicago Sun-Times want-ads but did not apply for jobs she saw advertised. She did apply for a job with the Jewel food store where she shopped. She also applied for and obtained a job with a company called Retail Grocery Inventory Service ("RGIS") in December, 1982. From that time until she went to work for Yellow Freight, she worked part-time at RGIS, working as many hours as she could as an inventory checker. Her employer, Dave Picard, testified that she was a good worker and worked as many hours as were available. Time records showed she worked 216 hours in the first quarter of 1983, 52.4 hours in the second quarter, 49.7 hours in the third quarter, 52.2 hours in the fourth quarter of 1983, 230.6 hours in the first quarter of 1984 and 141.4 hours in the second quarter of 1984.

Donnelly asked friends and neighbors about other jobs. She did not, however, apply for a job at the Dominicks food store in her neighborhood. She also did not seek a job with any other trucking company. Several trucking companies besides Yellow Freight have facilities in the general area in which Donnelly was interested in working. Each of these companies hired dock workers in 1983 and 1984. Only one, Roadway Express, employs women in that capacity. One other trucking company made an offer to a woman who did not accept the position.

If Donnelly had been hired on February 8, 1983, her wages, less income earned at RGIS, from that date through June 27, 1984, would have been $27,656.61. In addition, the pay difference through December 26, 1985 for retroactive seniority would have meant $4,800.00 in additional wages. Pension fund contributions for the period February 8, 1983 through June 27, 1984 would have been $3,976.00. Health and welfare contributions would have been $4,272.80.

II. *Conclusions of Law*

Donnelly is entitled to retroactive seniority. But for Yellow Freight's sex discrimination, her hire date would have been February 8, 1983. Therefore, that is the date on which her seniority should be based.

For the same reason, Donnelly is entitled to a judgment requiring Yellow Freight to make pension contributions on her behalf in the amount of $3,976.00 (plus any penalties or interest required by the Fund).

Since Donnelly did not actually work at Yellow Freight from February, 1983 through June, 1984, and has

presented no evidence to show what she paid for health insurance or in medical expenses that would have been covered by Yellow Freight's health and welfare benefits during that time, she is not entitled to an award of expenses for health or welfare benefits.

The major issue in this case is whether Donnelly took reasonable steps to mitigate her damages which would entitle her to a back pay award for the time during which Yellow Freight engaged in sex discrimination against her. Title VII states that "[i]nterim earnings or amounts earnable with reasonable diligence by the person . . . discriminated against shall operate to reduce the back pay otherwise available." 42 U.S.C. §2000(e)-5(q). In the Seventh Circuit, once a plaintiff establishes the amount of damages, the burden shifts to the employer to prove that the plaintiff failed to mitigate those damages. *Hanna v. American Motors Corp.*, 724 F.2d 1300 (7th Cir. 1984). The employer must show both that "the plaintiff failed to exercise reasonable diligence to mitigate his damages" and that "there was a reasonable likelihood that the plaintiff might have found comparable work by exercising reasonable diligence." *Id.* at 1307. (Emphasis omitted.)

The amount of diligence shown by Donnelly in seeking work was not great. She did, however, ask friends and neighbors about employment, inquired on numerous occasions at her local grocery store for employment and worked part-time for the entire period covered by the discrimination. A number of cases have held that this is enough. *E.g., Wheeler v. Snyder Buick, Inc.*, 794 F.2d 1228 (7th Cir. 1985) (temporary employment during four year period enough particularly where plaintiff's former job, as a car salesman, was in a kind of work in which

few women were employed); *Orzel v. City of Wauwatosa Fire Department*, 697 F.2d 743 (7th Cir. 1983) (part-time job as temporary census taker enough); *Sprogis v. United Air Lines, Inc.*, 517 F.2d 387 (7th Cir. 1975) (two month long temporary position and application for another position during two year period sufficient). In this case, while the issue is close, I conclude that Yellow Freight has not carried its burden of proof that Donnelly failed to exercise reasonable diligence in securing other employment during the period in question.

Even if Yellow Freight were to prevail on the issue of reasonable diligence, it has not met its burden of proof on the second prong of the *Hanna* test in that it has failed to show a reasonable likelihood that Donnelly might have found comparable work through reasonable diligence. Yellow Freight presented no evidence to show that any work available to Donnelly except that of dock worker at another trucking facility would have paid comparable wages or carried comparable status. While it did show that other trucking companies were hiring dock workers during the relevant period, only one of these companies actually employed women in the position (a total of five women, the first of which was hired in 1982). One other company offered a position to one woman. As Yellow Freight noted in closing argument, these companies hired 90 dock workers during this time. Considering the few women hired by any of these companies for this position, I conclude that, as the Seventh Circuit found in *Wheeler*, defendant has failed to show a reasonable likelihood that Donnelly would have found comparable work if she had applied. Donnelly is therefore entitled to back pay from February 8, 1983 to the date she was hired in the amount of $27,656.61.

Donnelly also seeks prejudgment interest. Prejudgment interest on back pay awards may be awarded in the discretion of the court. In this case, I agree that it should be awarded.[1]

Finally, Donnelly asks for attorneys fees in the base amount of $24,889.72, plus a multiplier of 1.5 for an aggregate award of $36,256.50 and $718.72 in costs. Yellow Freight disputes the amount of the award, arguing that actions by Donnelly extended the amount of work required and that unnecessary duplicative time is sought to be charged to defendant. I have examined the file and the hourly statements and agree that certain reductions are appropriate. First 18 hours between two attorneys spent on the pretrial order is excessive. While in some cases pretrial orders may require extensive time, that amount of time should not have been required here. Accordingly, the time is reduced to ten hours, one half of the reduction to be taken off each of the attorney's time.

I also agree that time spent in state court unsuccessfully litigating a claim under the Illinois Human Rights Act should be excluded. Accordingly, four hours of attorney Salzetta's time (5/14/85 and 5/15/85) and one half hour of Henely's time (on 5/16/85) should be excluded.

Yellow Freight prevailed on one part of its motion for summary judgment. Salzetta's time is therefore reduced by 6.5 hours and Henely's time is reduced by 2.5 hours (rounding off to the half hour).

---

1. Donnelly calculated the amount she claimed she would be entitled to based not only in back pay but pension fund and health and welfare contributions. Donnelly may only obtain interest on the back pay award.

Henely represents that his hourly rate is $150.00 and Salzetta's rate is $90.00. Yellow Freight has not shown that these rates are unreasonable and in my experience they represent customary rates in the community. I find they are reasonable.

Subtracting six hours from Henely's time and 15.5 hours from Salzetta's time, Donnelly's attorneys are entitled to attorneys' fees in the amount of $21,876.00 plus $718.72 in costs (the amount of costs is not disputed).

I do conclude that a multiplier is not appropriate in this case. Donnelly was employed by Yellow Freight months before her attorneys began representing her. Accordingly, they had nothing to do with her being hired. The case was not difficult (indeed, Yellow Freight conceded liability) and the principle risk related to the factual problem of Donnelly's limited efforts to obtain other employment. Donnelly's attorneys will be well compensated by the award of the hourly fees requested. No further award is justified.

In reviewing Donnelly's attorneys' fee petition, I note that they have a contingency fee agreement with Donnelly under which they are to receive forty percent of any amount awarded her *in addition* to any attorneys' fees awarded by the court. I have already concluded that the court award will fully compensate her attorneys. Contingency fee contracts are subject to the supervision of the courts. *Wheatley v. Ford*, 679 F.2d 1037, 1041 (2d Cir. 1982); *Krause v. Rhodes*, 640 F.2d 214, 219 (6th Cir. 1981). The court in *Wheatley* held that payment of a court award of attorney's fees satisfies the attorney's claim for services under the contingent fee contract. *Wheatley v. Ford*, *supra*, 679 F.2d at 1037. In this case the fee award that I have recommended

exceeds forty percent of Donnelly's recovery. I conclude that payment of any attorney fees by Donnelly under the contingent fee agreement in addition to the amounts to be paid by Yellow Freight would violate DR2-106 of the Code of Professional Responsibility,[2] which prohibits attorneys from collecting clearly excessive fees.[3]

/s/ Elaine E. Bucklo
Elaine E. Bucklo
United States Magistrate

---

2. DR-2-106 Fees for Legal Services

(A) A lawyer shall not enter into an agreement for, charge, or collect an illegal or clearly excessive fee.

(B) A fee is clearly excessive when, after a review of the facts, a lawyer of ordinary prudence would be left with a definite and firm conviction that the fee is excess of a reasonable fee. Factors to be considered as guides in determining the reasonableness of a fee include the following:

(1) The time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly.

(2) The likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer.

(3) The fee customarily charged in the locality for similar legal services.

(4) The amount involved and the results obtained.

(5) The time limitations imposed by the client or by the circumstances.

(6) The nature and length of the professional relationship with the client.

(7) The experience, reputation, and ability of the lawyer or lawyers performing the service.

(8) Whether the fee is fixed or contingent.

3. Donnelly's attorneys cite cases saying that a contingent fee agreement does not provide a ceiling on a court award of fees. That is entirely different from saying that an attorney can have a court award (in whatever amount is deemed appropriate) *and* a 40 percent bite out of a damage or back pay award in addition thereto.

Dated: December 10, 1987

Written objections to any finding of fact, conclusion of law, or the recommendation for disposition of this matter must be filed with the Honorable James B. Moran within ten (10) days after service of this Report and Recommendation. *See* Fed.R.Civ.P. 72(b). Failure to object will constitute a waiver of objections on appeal.

Copies have been mailed to:

JOHN J. HENELY
John J. Henely, Ltd.
75 East Wacker Drive
Suite 2200
Chicago, IL 60601
Attorney for Plaintiff

LEONARD R. KOFKIN
Berman, Fael, Haber, Maragos & Abrams
140 South Dearborn Street
Chicago, IL 60603
Attorney for Defendant

APPENDIX 6

(Dated November 22, 1985)

IN THE
UNITED STATES DISTRICT COURT
NORTHERN DISTRICT
OF ILLINOIS
EASTERN DIVISION

No. 85 C 7195
Before the Honorable George N. Leighton,
U. S. District Judge

COLLEEN DONNELLY,
Plaintiff,

v.

YELLOW FREIGHT SYSTEMS, INC.,
Defendant.

MEMORANDUM

On March 15, 1985, plaintiff received from the Equal Employment Opportunity Commission ("EEOC"), a notice of a right to sue for prior charges of sex discrimination she had filed with the EEOC against defendant. Pursuant to Section 706(f)(1) of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-5(f)(1), she was notified that she must, within 90 days after the issuance of the right-to-sue letter, bring a civil action against the defendant; "otherwise your right to sue is lost." On May 22, 1985, within the 90-day limit, plaintiff filed a two-count complaint in the Circuit Court of Cook County. Both counts of the complaint alleged discrimination in employment by

defendant on the basis of sex and were premised on violations of the Illinois Human Rights Act. Ill.Rev.Stat. ch. 68, par. 1-101 *et seq.* (1983).

On June 28, 1985, defendant filed a motion to dismiss. Plaintiff filed a motion to amend the complaint on August 9, 1985. The proposed amended pleading, although based on the same facts and circumstances as the original complaint, alleged violations of Title VII rather than the Illinois Human Rights Act. On that day, the circuit court entered an agreed order granting defendant's motion to dismiss the original complaint and setting a briefing schedule on plaintiff's motion to file the amended complaint.

On August 14, 1985, defendant removed the action to federal court. This court granted plaintiff leave to file the amended complaint on September 13, 1985; plaintiff did so on September 20, 1985. The amended complaint consists of two counts alleging violations of Title VII. Defendant now moves to dismiss the amended complaint as untimely.

Defendant asserts two separate arguments in support of its conclusion that plaintiff's Title VII claims are untimely, that is, not brought within the 90-day limitation period. First that any filing of a complaint in the circuit court, whether before or after the 90-day limit, was ineffective in that federal courts have exclusive jurisdiction over Title VII actions. Therefore, defendant concludes, the only effective filing of plaintiff's Title VII claims was on September 20, 1985, when plaintiff filed her amended complaint in this court; some six months after the right-to-sue letter was issued.

Second, defendant argues, even if the circuit court had jurisdiction over the Title VII claims, since the first complaint was based on the Illinois Human Rights Act

and not Title VII, it did not toll the 90-day limitation period in that § 706(f)(1) contemplates the filing of a Title VII claim, not one based on a state statute. Defendant points out that the first time plaintiff attempted to amend her claim to a Title VII action in the state court was on August 9, 1985; a date well beyond the 90-day limit. Defendant therefore concludes that the claim is untimely.

As to the jurisdictional argument, the general rule is that unless Congress has made jurisdiction exclusive to the federal courts, state courts have concurrent jurisdiction and may entertain actions based entirely on federal law. *Gulf Offshore Co. v. Mobile Oil Corp.*, 453 U.S. 473, 477-78 (1981). In this regard, the court begins with the presumption that state courts have concurrent jurisdiction. That presumption can be rebutted only by "an explicit statutory directive, by unmistakable implication from legislative history, or by a clear incompatibility between state-court jurisdiction and federal interests." *Id.* at 478.

Nowhere in Title VII, neither in language of § 706(f)(1), which gives rise to causes of action nor in § 706(f)(3), which invests this court with jurisdiction, is there an explicit directive from Congress reserving jurisdiction exclusively to the federal courts. *Bennum v. Board of Governors of Rutgers*, 413 F. Supp. 1274, 1279 (D.N.Y. 1976); *Greene v. County School Board of Henrico County, Virgina*, 542 F. Supp. 43, 45 (E.D. Va. 1981).

The legislative history is likewise without clear indication of Congress' intent to make Title VII jurisdiction exclusive. *Bennum*, 413 F. Supp. at 1279; *Greene*, 525 F. Supp. at 45; *Patzer v. Board of Regents of University of Wisconsin*, 577 F. Supp. 1553, 1559 (N.D. Wis. 1984), *rev'd on other grounds*, 763 F.2d 855 (7th Cir. 1985);

contra, Valensuela v. Kraft, 739 F.2d 434, 436 (9th Cir. 1984); *Dickenson v. Chrysler Corp.,* 456 F. Supp. 43, 48 (E.D. Mich. 1978). Further, there is certainly no clear incompatibility between state-court jurisdiction and federal interest in the area of employment discrimination. "Title VII was designed to supplement, rather that supplant, existing laws and institutions relating to employment discrimination." *New York Gaslight Club, Inc. v. Carey,* 447 U.S. 54, 68 (1980); *see also, Spence v. Latting,* 512 F.2d 93, 98 (10th Cir. 1975) and *Bostedt v. Festivals, Inc.,* 569 F. Supp. 503, 507 (N.D. Ill. 1983) (holding that state courts have concurrent jurisdiction with federal district courts over cases arising under 42 U.S.C. § 1983).

Based on the above, it is the courts' opinion that state and federal courts have concurrent jurisdiction to hear claims under Title VII. Therefore, the issue remaining is whether the filing of the original complaint in the circuit court tolled the 90-day limitation period, even though it was based entirely on Illinois statutory law. Once again the court begins its analysis with a presumption, that being that all doubts on jurisdictional timeliness questions are to be resolved in favor of trial. *Caldwell v. National Association of Home Builders,* 771 F.2d 1051, 1054 (7th Cir. 1985).

Federal Rules of Civil Procedure, Rule 15(c) provides that whenever a claim in an amended complaint arises out of the same conduct, transaction or occurrence set forth in the original complaint, the amendment relates back to the date the original complaint was filed. Since the claim in plaintiff's amended complaint, filed on September 20, 1985, arose out of the same set of facts and circumstances as did the claim in the original complaint, the amendment relates back to May 22, 1985, the date of the filing of the original complaint. Therefore, plaintiff's Title VII claims were brought prior to the lapse of the 90-day limitation and were timely. *See, Baldwin County Welcome Center v. Brown,* 446 U.S. 147, ... n.3, 104 S. Ct. 1723, 1725 n.3 (1984).

Further, merely because plaintiff's original complaint based her discrimination claim on Illinois statutory law rather that Title VII does not change the result. *See, Paskuly v. Marshall Field & Co.,* 646 F.2d 1210, 1211 (7th Cir. 1981). The requirement for relation back under Rule 15(c) is not, as defendant suggests, that the substantive legal theory of the amended complaint be the same as the theory in the original complaint, but rather that the claims arise out of the same "conduct, transaction or occurrence."

"So long as the Title VII claim is based on the discrimination originally charged in the complaint, allowing it to relate back . . . works no hardship on the defendant for the original complaint furnished adequate notice of the nature of the suit." *Sessions v. Rusk State Hospital,* 648 F.2d 1066, 1070 (5th Cir. 1981); *see also, Smith v. Town of Clarkton, North Carolina,* 682 F.2d 1055, 1060 (4th Cir. 1982).

Here, the Title VII and Illinois Human Rights Act claims are based on identical facts and circumstances, therefore, relation back applies and the suit was timely filed. Accordingly, defendant's motion to dismiss is denied.

So ordered,

/s/ George N. Leighton
George N. Leighton
United States District Judge

Dated: November 22, 1985

APPENDIX 7

(Filed August 8, 1985)

IN THE
CIRCUIT COURT OF COOK COUNTY,
ILLINOIS

NO. 85 L 11199

Colleen Donnelley

v.

Yellow Freight Systems

AGREED ORDER

This cause coming to be heard upon Defendant's motion to dismiss the Complaint and upon Plaintiff's motion for leave to file an amended complaint, and the parties being in Agreement,

It is hereby Ordered that:

1. Defendant's motion to dismiss is granted and the Complaint be and hereby is dismissed with prejudice.
2. Plaintiff is granted until September 7, 1985 to file a memorandum in support of her motion for leave to file an amended Complaint, and Defendant is granted until September 21, 1985 to reply.
3. Plaintiff's motion for leave to amend is continued until October 1, 1985 at 9:30 am without further notice.

Name Berman, Fael, Haber, Maragos & Abrams
Attorney for Def.
Address 140 S. Dearborn
City Chi
Telephone 580-2233
#90041

JUDGE EDWIN M. DERMAN

AUG. 9, 1985

CIRCUIT COURT

MORGAN M. FINLEY, CLERK OF THE
CIRCUIT COURT OF COOK COUNTY

No. 89-431

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

YELLOW FREIGHT SYSTEM, INC.,

Petitioner,

vs.

COLLEEN DONNELLY,

Respondent.

RESPONSE OF COLLEEN DONNELLY TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MICHAEL W. RATHSACK
(Counsel of Record)
77 West Washington Street
Suite 508
Chicago, Illinois 60602
(312) 726-5433

JOHN J. HENELY
JOHN J. HENELY, LTD.
75 East Wacker Drive
Suite 2200
Chicago, Illinois 60601
(312) 263-1733

Attorneys for Respondent

Midwest Law Printing Co., Chicago 60611, (312) 321-0220

QUESTIONS PRESENTED FOR REVIEW

The questions presented for review are:

(1) Whether state and federal courts have concurrent jurisdiction over sex discrimination cases brought under Title VII of the Civil Rights Act of 1964 [42 U.S.C. Sec. 2000e, *et seq.*]; and

(2) Whether the reviewing courts properly affirmed the finding of the trial court that the claimant satisfied her duty to take reasonable steps to minimize her damages. Respondent disagrees with the petitioner's description of this issue.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Statutes

No. 89-431

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

YELLOW FREIGHT SYSTEM, INC.,

Petitioner,

vs.

COLLEEN DONNELLY,

Respondent.

RESPONSE OF COLLEEN DONNELLY TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit was handed down on April 28, 1989 and is reported at 874 F.2d 402. The petition for rehearing was denied. The decision of the United States District Court for the Northern District of Illinois was handed down on March 17, 1989 and is reported at 682 F.Supp. 374. The Report and Recommendation of the United States Magistrate and the opinion of the District Court entered on November 22, 1985 on the issue of jurisdiction were not reported.

JURISDICTION

This Court has jurisdiction of this matter pursuant to 28 U.S.C. Sec. 1254(1).

STATUTE INVOLVED

The following statutory sections are set out in the petition:

42 U.S.C. Sec. 2000e-5(f)
42 U.S.C. Sec. 2000e-5(g)
42 U.S.C. Sec. 2000e-5(j)

STATEMENT OF THE CASE

The facts of this case are drawn from testimony in a trial conducted before a Magistrate. Defendant Yellow Freight System, Inc., admitted its liability for sex discrimination under 42 U.S.C. Sec. 2000e [Title VII of the Civil Rights Act of 1964] and the matter proceeded for a determination of damages.

Plaintiff applied for work with defendant Yellow Freight in October of 1982, shortly after moving to the Chicago area. Tr. 13, 14. She wanted to work in the area where she lived, and Yellow Freight was four blocks away. Tr. 13, 19. Defendant's terminal manager informed plaintiff that Yellow Freight was not hiring but that she would

be the first hired when the next opportunity arose. Tr. 15. She called the manager every week, as directed, to check for job openings. Tr. 16. She knew, from talking with others, that Yellow Freight was hiring, but the manager told her that they were laying off rather than hiring. Tr. 33, 34.

Plaintiff checked the want ads for jobs and checked with friends and various other persons. Tr. 16-21. In November of 1982, plaintiff obtained a job working part-time for RGIS, located near her home. She worked there until June of 1984 when she filed her EEOC complaint and was then hired by defendant. Tr. 16, 17, 29. She accepted all the hours that were available to her at RGIS, working 423 hours in 1983 and 371 hours prior to June of 1984. Tr. 39, 40.

The Magistrate also found that Yellow Freight had begun hiring numerous persons, all male, in February of 1983. The Magistrate further found that Yellow Freight had not carried its burden of showing that plaintiff had failed to exercise reasonable diligence in securing other employment. Pet. App. A-27–A-30. The Magistrate further found that even if defendant had met its burden of proof on that issue, defendant nonetheless had failed to meet its additional burden of showing a reasonable likelihood that plaintiff might have found comparable work through reasonable diligence. Pet. App. A-30. Other trucking companies had hired 90 dock workers during the time in question, but only one hired women and only five of the 90 were women. Pet. App. A-30.

The Magistrate recommended back pay from the date that defendant began hiring [February 8, 1983] in the amount of $27,656.61; retroactive seniority in the amount of $4,800.00; pension contributions in the amount of $3,976.00; attorneys' fees of $21,876.00; costs; and prejudgment interest.

Pet. App. A-28, A-32, A-33. The trial court implemented those recommendations except as to prejudgment interest. Pet. App. A-23. The Court of Appeals for the Seventh Circuit affirmed the various awards to plaintiff and returned the case for entry of an order granting prejudgment interest. Yellow Freight's petition for rehearing was denied, and their petition for certiorari was docketed on September 13, 1989.

SUMMARY OF THE ARGUMENT

Certiorari is not appropriate at this juncture because the jurisdictional issue has not been developed in adequate scope by the circuits, with only two circuits having provided adversarial based analysis. There is also an alternative basis for resolution of this case which is independent of this issue, and that would require remand for further consideration even if certiorari was granted and the case was reversed on review. As to the question of damages, there is no conflict between any of the circuits as to the appropriate standard and, again, there was an alternate basis for the court's finding in that regard which would require affirmance even if the Court concurred with petitioner's contention.

ARGUMENT

I.

ALTHOUGH THE SEVENTH AND THE NINTH CIRCUITS NOW DIFFER AS TO WHETHER STATE AND FEDERAL COURTS HAVE CONCURRENT JURISDICTION OF SEX DISCRIMINATION CHARGES BASED ON TITLE VII, THAT DIVERGENCE OF OPINION DOES NOT REQUIRE INTERVENTION BY THIS COURT AT THIS TIME.

The Seventh Circuit and the Ninth Circuit now differ on the question of whether state and federal courts have concurrent jurisdiction of actions brought under 42 U.S.C. Sec. 2000e-5(f) [Section 706(f) of Title VII of the Civil Rights Act of 1964] for sex discrimination. The Seventh Circuit in this case has found that there is concurrent state and federal jurisdiction, whereas the Ninth Circuit in *Valenzuela v. Kraft, Inc.*, 739 F.2d 434 (9th Cir. 1984) held that the federal courts had exclusive jurisdiction of cases arising under Title VII. [Respondent notes for completeness that this Court mentioned the issue but noted that it was not deciding the question in *Kremer v. Chemical Construction Company*, 456 U.S. 461, 479, 102 S.Ct. 1883, 1896, fn. 20 (1982)].

However, contrary to Yellow Freight's argument, the question remains in a developmental stage and does not have widespread significance. The division of opinion is a limited division, and most circuits have not yet had the opportunity to specifically address the issue. Yellow Freight contended that three other Circuits [Third, Tenth, and Eleventh] concur with the Ninth Circuit. However, in those cases the jurisdictional issue was either not contested or was only mentioned in passing without analysis, and in one instance the cited case was actually reversed.

Until a need arises for unanimity in approach to this issue, Title VII cases can continue to be resolved in the various circuits regardless of whether the forum is state or federal. The issue is not what the law should be, but rather who should apply the law. The consequence of a grant of certiorari would, as to most sex discrimination cases, simply be a determination of the appropriate forum. In this particular instance, the forum determination might possibly be determinative of the right to pursue the action because of the removal scenario. However, in almost all other such cases, the posed question lacks the immediate importance attributed to it by defendant because decisions on the merits of the cases will be the same regardless of the forum.

There is currently adequate case law to guide both federal and state courts in their adjudication of cases brought under Section 706(f) of Title VII. State courts have certainly shown the ability to adequately carry out the intent of Congress in other areas of federal legislation, e.g. 42 U.S.C. Sec. 1983. There is no reason to believe that the same will not be true in this instance, and there is no need to increase the caseload of the circuit courts when the current intent appears to be the opposite, e.g., the increase in the jurisdictional amount in diversity jurisdiction cases.

The absence of analysis in the other cited circuits is reflected in the opinion in *Bradshaw v. General Motors Corp.*, 805 F.2d 110, 112 (3rd Cir. 1986). Plaintiff there brought suit in state court under state tort theories, 42 U.S.C. Sec. 1981, and Title VII, and the defendant removed to federal court. The question of concurrent jurisdiction was not at issue and thus was not briefed, and was only raised by the court at oral argument. The reviewing court simply held, without analysis, that Title VII

vested exclusive jurisdiction in the federal courts. The court went on to note [fn. 3 at 113] that even if concurrent jurisdiction existed, the plaintiff was unlikely to prevail due to the delay in taking action after receiving the notice of the right to sue from the EEOC. Thus there was an independent basis for that court's decision, and it is questionable as to whether the same result would hold in another case where the issue was fully briefed.

Yellow Freight also relied on *Long v. State of Florida*, 805 F.2d 1542, 1546 (11th Cir. 1986). Certiorari was denied as to the plaintiffs' petition (484 U.S. 820, 108 S.Ct. 78) but was granted as to certain nonjurisdictional questions raised by defendant (484 U.S. 814, 108 S.Ct. 65) and this Court subsequently reversed. *Florida v. Long*, ____ U.S. ____, 108 S.Ct. 2354, 101 L.Ed.2d 206 (1988). Florida had argued in the Eleventh Circuit that plaintiffs' suit under Title VII was barred by res judicata, on the grounds that plaintiff had lost similar claims in state court. The Circuit Court mentioned exclusive jurisdiction only in the context of applying res judicata, stating without analysis that res judicata was not applicable because the plaintiff could not have brought his Title VII claim in state court. The Eleventh Circuit apparently accepted the Florida appellate court's statement in an earlier state court appeal that the state trial court had properly ignored plaintiff's Title VII claim because it had no jurisdiction. See *Long v. Dept. Admin., Div. of Retirement*, 428 So.2d 688 (Fla. Dist. Ct. of Appeal 1983).

Finally, in *Jones v. Intermountain Power Project*, 794 F.2d 546, 553 (10th Cir. 1986), the only question before the Tenth Circuit was whether state claims could be pendent claims in a Title VII action. The court answered in the affirmative at 552. The court then noted that its inquiry could end there, but discussed the matter further.

It ultimately noted that the plaintiff could not otherwise have all his claims heard together because Title VII claims could be filed only in federal court, citing *Valenzuela* without discussion. Again, the question was presented in an indirect context, apparently without benefit of briefs, and the holding was dicta.

The only other circuit court opinion was *Dyer v. Greif Bros., Inc.*, 755 F.2d 1391, 1393 (9th Cir. 1985). The Ninth Circuit again raised the jurisdictional question itself after removal and simply followed the circuit's prior ruling in *Valenzuela*. This subsequent decision by a different panel was seemingly without enthusiasm, as reflected in the comment at 1393, that "Nonetheless, since *Valenzuela* is the current law of this circuit by which we are bound, . . .", and leaves room to question as to whether *Valenzuela* will remain the law.

In summary, only two circuits have reached a reasoned determination of the jurisdictional question, and one of those seems unenthusiastic about its own earlier ruling. For that reason, the jurisdictional question has not received the type of thorough inquiry that frequently precedes review by this Court. If certiorari is deferred until more circuits have an opportunity to analyze all facets of the issue, it may well be that the issue will be resolved with unanimity and without need for supervision. The question is not yet ripe for certiorari.

Even if certiorari was granted and a reversal subsequently occurred, the matter would nonetheless not be brought to a conclusion. The case would then have to be remanded for a ruling on Donnelly's claim that the state court filing equitably tolled the limitation period. Although the state court claim did not specifically refer to Title VII, the allegations were couched in that language and were based upon the EEOC's right to sue letters attached as

exhibits. The case was removed and the complaint was amended to add a specific reference to Title VII. Under *Fox v. Eaton Corporation*, 615 F.2d 716, 719 (6th Cir. 1980), *cert. denied*, 450 U.S. 935, 101 S.Ct. 1401 (1981), a claim filed in state court can toll the limitations period regardless of whether concurrent jurisdiction is found. Whether the Seventh Circuit would agree with *Fox*, in view of its reasoning in the overruled *Brown v. Reliable Sheet Metal Works, Inc.*, 852 F.2d 932, 934 (1988), is immaterial. The point is that the court did not have to reach this argument in this case, and remand for further consideration would be necessary in order to resolve this additional claim.

II.

THE REVIEWING COURT PROPERLY AFFIRMED THE DECISION OF THE TRIAL COURT WHICH FOUND THAT PLAINTIFF SATISFIED HER BURDEN OF SHOWING THAT SHE EXERCISED REASONABLE DILIGENCE IN MITIGATING HER DAMAGES. THERE IS NO CONFLICT BETWEEN THE CIRCUITS ON THIS POINT.

The conflict claimed by defendant Yellow Freight does not exist. In this case, the trial court resolved a factual question as to whether plaintiff had satisfied her duty to mitigate her damages. She had searched for other work, and accepted part-time employment in the area of her home. She worked as many hours as were available at that job. The job was a substantial one, and her conduct was especially reasonable in light of the fact that defendant was falsely telling plaintiff that she would be the first one hired when hiring resumed. Presumably plaintiff thought she would be working for defendant shortly, and it would have seemed a useless act to take a full time job elsewhere with the intent to quit immediately upon hearing from Yellow Freight. In plain language, defen-

dant lied to her about its plan to hire her imminently and now argues that she should not have relied on their representation of imminent employment when considering other job opportunities.

The Seventh Circuit did not set a new standard in this regard and certainly did not hold that the employee had to simply seek other employment. Pet. at 15. Here plaintiff did seek other full time work. The Magistrate noted that Yellow Freight had failed to carry its burden of showing that Ms. Donnelly failed to exercise reasonable diligence. It is equally important to note that the Magistrate also found that Yellow Freight failed to show a reasonable likelihood that Ms. Donnelly would have found comparable work through reasonable diligence. After all, the other trucking companies in the area were apparently also discriminating as only one of them hired women and that one hired only a very small number of women. The court below mentioned but did not have to reach this latter point: defendant's failure to prove the likelihood of comparable employment would thus have served as an alternate basis for affirmance of the damage award.

The damage award was determined by the particular facts of this case and not by any change in the law by the Seventh Circuit. The court was bound by the trial court's award of damages unless that determination was clearly erroneous. *Albermarle Paper Co. v. Moody*, 422 U.S. 405, 424, 95 S.Ct. 2362, 2375 (1975). Under appropriate circumstances, such as were found by the trial court to exist in this case, part time work can satisfy the requirement of reasonable diligence. *Wheeler v. Snyder Buick, Inc.*, 794 F.2d 1228, 1234 (7th Cir. 1986).

This case does not conflict with the holdings of *Ford v. Nicks*, 866 F.2d 865 (6th Cir. 1989) and *Johnson v. Chapel Hill Independent School District*, 853 F.2d 375 (5th

Cir. 1988). The court in *Ford* rejected the employer's argument that the applicant's part time work for her husband [without showing a reason for not getting a better job] constituted a failure to mitigate damages, noting at 869 that the employer had not shown what she could have earned if employed full time. The opinion instead rested on the applicant's rejection without cause of an equal job at the same salary. In *Johnson*, there was evidence of numerous equal employment opportunities not sought out by the applicant: rather than seek work, she simply went to work in a family store without pay. Both cases are factually and legally distinguishable.

CONCLUSION

For the reasons stated, respondent Colleen Donnelly requests that the petition for certiorari be denied.

Respectfully submitted,

MICHAEL W. RATHSACK
(Counsel of Record)
77 West Washington Street
Suite 508
Chicago, Illinois 60602
(312) 726-5433

JOHN J. HENELY
JOHN J. HENELY, LTD.
75 East Wacker Drive
Suite 2200
Chicago, Illinois 60601
(312) 263-1733

Attorneys for Respondent

No. 89-431

In the Supreme Court of the United States

OCTOBER TERM, 1989

YELLOW FREIGHT SYSTEM, INC.,
Petitioner,

vs.

COLLEEN DONNELLY,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE SEVENTH CIRCUIT

JOINT APPENDIX

JEFFREY IVAN PASEK*
ALAN M. LERNER
COHEN, SHAPIRO, POLISHER,
SHIEKMAN AND COHEN
12 South 12th Street
Philadelphia, PA 19107
Counsel for Petitioner

MICHAEL W. RATHSACK*
77 West Washington Street
Suite 508
Chicago, IL 60602
JOHN J. HENELY
75 East Wacker Drive
Suite 2200
Chicago, IL 60601
Counsel for Respondent

*Counsel of Record

Petition for Certiorari Filed September 11, 1989
Certiorari Granted November 6, 1989

TABLE OF CONTENTS

*Reproduced in the Appendix to the Petition for Certiorari.

RELEVANT DOCKET ENTRIES IN THE COURTS BELOW

No docket entries appear in the record of the Circuit Court of Cook County, Illinois. A chronological list of relevant proceedings follows:

1.	May 22, 1985	Summons issued
2.	May 22, 1985	Complaint filed
3.	June 28, 1985	Notice of Defendant's Motion to Dismiss
4.	June 28, 1985	Defendant's Motion to Dismiss
5.	July 17, 1985	Notice of Plaintiff's Motion to File Amended Complaint at Law
6.	July 17, 1985	Motion to File Amended Complaint at Law
7.	July 23, 1985	Defendant's Response and Objection to Plaintiff's Motion for Leave to File Amended Complaint
8.	August 9, 1985	Agreed order

United States District Court for the Northern District of Illinois

1.	August 14, 1985	Defendant's Petition for Removal from the Circuit Court of Cook County
2.	September 13, 1985	Order Motion of plaintiff to amend Complaint is granted
3.	September 20, 1985	Notice of filing and Amended Complaint filed

4.	November 22, 1985	Memorandum Order dated November 22, 1985, Defendant's Motion to Dismiss is Denied
5.	December 10, 1987	Report and Recommendation of Magistrate Elaine E. Bucklo
6.	March 17, 1988	Memorandum and Order
7.	March 17, 1988	Judgment

United States Court of Appeals
For the Seventh Circuit

1.	April 12, 1988	Notice of Appeal Filed
2.	April 28, 1989	Opinion
3.	May 17, 1989	Order Extending time to file Petition for Rehearing
4.	May 26, 1989	Petition for Rehearing with Suggestion for Rehearing En Banc
5.	July 17, 1989	Order denying Petition for Rehearing with Suggestion for Rehearing En Banc

(Filed June 10, 1985)

IN THE
CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, LAW DIVISION

No. 85L11199

COLLEEN DONNELLY,
Plaintiff,

vs.

YELLOW FREIGHT SYSTEMS, INC.
Defendant.

PLEASE SERVE:
YELLOW FREIGHT SYSTEMS, INC.
CT CORPORATION SYSTEM
208 SOUTH LASALLE STREET
CHICAGO, IL 60604

SUMMONS
(Jury Demand)

To each defendant:

YOU ARE SUMMONED and required to file an answer in this case, or otherwise file your appearance in the office of the clerk of this court (located in the Richard J. Daley Center, Room* 801, Chicago, Illinois 60602), within 30 days after service of this summons, not counting the day of service. IF YOU FAIL TO DO SO, A JUDGMENT BY DEFAULT MAY BE TAKEN AGAINST YOU FOR

THE RELIEF ASKED IN THE COMPLAINT, A COPY OF WHICH IS HERETO ATTACHED.

To the officer.

This summons must be returned by the officer or other person to whom it was given for service, with indorsement of service and fees, if any, immediately after service. If service cannot be made, this summons shall be returned so indorsed. This summons may not be served later than 30 days after its date.

WITNESS, MAY 22, 1985
/s/ Morgan M. Finley
Clerk of court

* * *

Atty. No. 91872
Name JOHN J. HENELY, LTD.
Attorney for PLAINTIFF
Address TWO NORTH LASALLE STREET
City CHICAGO, IL 60602
Telephone 899-9090

*Law Division Room 801
Chancery-Divorce Division Room 802
County Division Room 801
Probate Division Room 1202

(May 22, 1985)

STATE OF ILLINOIS)
) SS:
COUNTY OF COOK)

IN THE
CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, LAW DIVISION

No. 85L11199

COLLEEN DONNELLY,
Plaintiff,

vs.

YELLOW FREIGHT SYSTEMS, INC.,
Defendant.

COMPLAINT AT LAW
PLAINTIFF DEMANDS TRIAL BY JURY

COUNT I

Plaintiff, COLLEEN DONNELLY, complaining of the defendant, YELLOW FREIGHT SYSTEMS, INC., alleges and says:

1. This action arises under the provisions of the Illinois Human Rights Act (Ill. Rev. Stat. Ch. 68, Par. 1-101, *et seq.* 1983). This court has jurisdiction of this action pursuant to Plaintiff's exhaustion of administrative remedies with the Equal Employment Opportunity Commission and its subsequent issuance of Notice of Right to Sue, a copy of which is attached hereto as Exhibit A.

2. Plaintiff, COLLEEN DONNELLY is, and at all times herein mentioned was, a female resident of the Village of Chicago Ridge, County of Cook and State of Illinois.

3. Defendant, YELLOW FREIGHT SYSTEMS, INC., is, and at all times herein mentioned was, a foreign corporation engaged in the business of transporting goods as a motor carrier in interstate commerce with district offices and place of business located at or near 10301 South Harlem Avenue, Chicago Ridge, Cook County, Illinois.

4. At all relevant times, defendant has employed within Illinois twenty or more employees during twenty or more calendar weeks within the preceding year of the acts complained of herein. Defendant was and is, therefore, an employer within the meaning of Section 2-101(B)(1)(a) of the Human Rights Act (Ill. Rev. Stat. Ch. 68, Sec. 2-101(B)(1)(a).

5. On or about November, 1982, Plaintiff sought employment at Defendant's place of business as a "loader."

6. Although Plaintiff was fully qualified for the applied for position, Defendant failed to hire Plaintiff on the basis of her sex and as such was in violation of the Human Rights Act, to wit:

(a) Failed to hire Plaintiff on the basis of her sex, in violation of Sec. 2-102(A), Ch. 68 of the Ill. Rev. Stat.;

(b) Failed to hire Plaintiff on the basis of her sex despite weekly repeated calls to Defendant requesting employment;

(c) Failed to hire Plaintiff on the basis of her sex while Defendant continued to hire at least twenty-five

men since her application for employment was denied;

(d) Failed to hire Plaintiff on the basis of her sex while hiring men even though her qualifications for the position(s) is similar or equal to those of the men hired.

7. On June 27, 1984, Defendant hired Plaintiff.

8. As a result of Defendant's failure to hire Plaintiff in its employ because of her sex, Plaintiff was caused to suffer unpaid wages and compensation, from November, 1982 to her ultimate hiring date of June 27, 1984 at Defendant's employ, in the sum of $30,000.00, which sum would have been paid by Defendant to Plaintiff, but for Defendant's wrongful act.

WHEREFORE, Plaintiff prays as follows:

1. That this Court award Plaintiff the sum of $30,000.00 as unpaid wages and compensation for the loss of wages she sustained from November, 1982 to June 27, 1984.

2. That this Court award Plaintiff retroactive seniority to that which she would be entitled to had she been hired in November, 1982, and such other fringe benefits as Plaintiff may have been denied.

3. That this Court award Plaintiff a reasonable amount for attorney's fees and costs of this action pursuant to Ill. Rev. Stat., Ch. 68, Sec. 8-108(G).

4. That this Court grant Plaintiff such other further relief as may be just, equitable, and make Plaintiff whole.

COUNT II

Plaintiff, COLLEEN DONNELLY, complaining of Defendant, YELLOW FREIGHT SYSTEMS, INC., alleges and says:

1. This action arises under the provisions of the Illinois Human Rights Act (Ill. Rev. Stat. Ch. 68, Par. 1-101, *et seq.* 1983). This court has jurisdiction of this action pursuant to Plaintiff's exhaustion of administrative remedies with the Equal Employment Opportunity Commission and its subsequent issuance of Notice of Right to Sue, a copy of which is attached hereto as Exhibit B.

2. Plaintiff, COLLEEN DONNELLY is, and at all times herein mentioned was, a female resident of the Village of Chicago Ridge, County of Cook and State of Illinois.

3. Defendant, YELLOW FREIGHT SYSTEMS, INC., is, and at all times herein mentioned was, a foreign corporation engaged in the business of transporting goods as a motor carrier in interstate commerce with district offices and place of business located at or near 10301 South Harlem Avenue, Chicago Ridge, Cook County, Illinois.

4. At all relevant times, defendant has employed within Illinois twenty or more employees during twenty or more calendar weeks within the preceding year of the acts complained of herein. Defendant was, and is, therefore, an employer within the meaning of Section 2-101(B)(1)(a) of the Human Rights Act (Ill. Rev. Stat. Ch. 68, Sec. 2-101(B)(1)(a).

5. On June 27, 1984, Plaintiff began employment with Defendant as a loader.

6. That since September 27, 1984, Defendant has engaged in conduct discriminating against Plaintiff on the basis of her sex, to wit:

(a) As of September 27, 1984, Defendant restricted Plaintiff to two ten-minute breaks during working hours, whereas males are permitted two, fifteen-minute breaks and one fifteen minute wash-up break at the end of the day;

(b) Defendant has restricted Plaintiff to two ten-minute breaks, although the union bargaining agreement calls for two fifteen-minute breaks and a wash-up break;

(c) That Plaintiff, as the only female employed as loader is the only person in that position to receive said disparate treatment;

(d) That Plaintiff has received no explanation for the difference in treatment;

(e) That Plaintiff continues to receive other disparate treatment in her employment based upon her sex and with the intent to force her voluntary resignation from her employment;

(f) That Defendant's disparate treatment was done in retaliation against Plaintiff for filing a charge of sex discrimination in failure to hire her, in violation of Sec. 6-101(A), Ch. 68 of the Illinois Human Rights Act. (Ill. Rev. Stat. Ch. 68, Sec. 6-101(A) 1983).

7. That as a result of Defendant's foregoing treatment, Plaintiff has suffered loss of actual damages and the full and equal enjoyment of the goods, services, facilities, privileges and advantages of the Defendant.

WHEREFORE, Plaintiff prays as follows:

1. That this Court award Plaintiff a sum of money for actual damages sustained as a result of Defendant's

unlawful sex discrimination, disparate treatment and continuing harassment.

2. That this Court enter an order compelling Defendant to cease and desist from any further unlawful discrimination.

3. That this Court award Plaintiff a reasonable amount for attorney's fees and costs of this action pursuant to Ill. Rev. Stat. Ch. 68, Sec. 8-108(G).

4. That this Court grant Plaintiff such other further relief as may be just, equitable and make Plaintiff whole.

/s/ Clifford & Henely, Ltd.
Attorneys for Plaintiff

JOHN J. HENELY, LTD., 91872
TWO NORTH LASALLE STREET
CHICAGO, IL 60602
312-899-9090

PLAINTIFF'S EXHIBIT A

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

NOTICE OF RIGHT TO SUE
(Issued on Request)

TO:
Ms. Colleen C. Donnelly
9654 Nottingham
Chicago Ridge, Illinois 60415

FROM:
Equal Employment Opportunity Commission
536 South Clark Street
Chicago, Illinois 60605

☐ On behalf of a person aggrieved whose identity is CONFIDENTIAL (29 C.F.R. 1601.7(a)).

CHARGE NUMBER
051841325

EEOC REPRESENTATIVE
Frank J. Keller

TELEPHONE NUMBER
(312) 886-0435

(See Section 706(f)(1) and (f)(3) of the Civil Rights Act of 1964 and the other information on the reverse side of this form.)

TO THE PERSON AGGRIEVED:

This is your NOTICE OF RIGHT TO SUE. It is issued at your request. If you intend to sue the respondent(s) named in your charge, YOU MUST DO SO WITHIN NINETY (90) DAYS OF YOUR RECEIPT OF THIS NOTICE: OTHERWISE YOUR RIGHT TO SUE IS LOST.

☒ More than 180 days have expired since the filing of this charge.

☐ Less than 180 days have expired since the filing of this charge, but I have determined that the Commission will be unable to complete its administrative process within 180 days from the filing of the charge.

☒ With the issuance of this Notice of Right to Sue, the Commission is terminating any further processing of this charge.

☐ It has been determined that the Commission will continue to process your charge.

☐ ADEA - While Title VII requires the Commission to issue a Notice of Right to Sue before you can bring suit under that law, you obtained the right to sue under the Age Discrimination in Employment Act (ADEA) when you filed your charge, subject to a 60-day waiting period. ADEA suits must be brought within 2 years (3 years in cases of willful violations) of the alleged discrimination.

☐ EPA - While Title VII requires the Commission to issue a Notice of Right to Sue before you can bring suit under that law, you already have the right to sue under the Equal Pay Act (EPA) (you are not required to complain to any administrative agency before bringing an EPA suit in court). EPA suits must be brought within 2 years (3 years in cases of willful violations) of the alleged EPA underpayment.

An information copy of this Notice of Right to Sue has been sent to the respondent(s) shown below.

Yellow Freight System
10301 South Harlem Avenue
Chicago Ridge, Illinois 60415

cc: (to respondent) On behalf of the Commission

☒ Copy of Charge

/s/ Kathleen M. Blunt Date 3-15-85
Typed Name and Title
of Issuing Official
KATHLEEN M. BLUNT
DISTRICT DIRECTOR

PLAINTIFF'S EXHIBIT B

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

NOTICE OF RIGHT TO SUE
(Issued on Request)

TO:
Ms. Colleen C. Donnelly
9654 Nottingham
Chicago Ridge, Illinois 60415

FROM:
Equal Employment Opportunity Commission
536 South Clark Street
Chicago, Illinois 60605

☐ On behalf of a person aggrieved whose identity is CONFIDENTIAL (29 C.F.R. 1601.7(a)).

CHARGE NUMBER
051850005

EEOC REPRESENTATIVE
Frank J. Keller

TELEPHONE NUMBER
(312) 886-0435

(See Section 706(f)(1) and (f)(3) of the Civil Rights Act of 1964 and the other information on the reverse side of this form.)

TO THE PERSON AGGRIEVED:

This is your NOTICE OF RIGHT TO SUE. It is issued at your request. If you intend to sue the respondent(s) named in your charge, YOU MUST DO SO WITHIN NINETY (90) DAYS OF YOUR RECEIPT OF THIS NOTICE: OTHERWISE YOUR RIGHT TO SUE IS LOST.

☐ More than 180 days have expired since the filing of this charge.

☒ Less than 180 days have expired since the filing of this charge, but I have determined that the Commission will be unable to complete its administrative process within 180 days from the filing of the charge.

☒ With the issuance of this Notice of Right to Sue, the Commission is terminating any further processing of this charge.

☐ It has been determined that the Commission will continue to process your charge.

☐ ADEA - While Title VII requires the Commission to issue a Notice of Right to Sue before you can bring suit under that law, you obtained the right to sue under the Age Discrimination in Employment Act (ADEA) when you filed your charge, subject to a 60-day waiting period. ADEA suits must be brought within 2 years (3 years in cases of willful violations) of the alleged discrimination.

☐ EPA - While Title VII requires the Commission to issue a Notice of Right to Sue before you can bring suit under that law, you already have the right to sue under the Equal Pay Act (EPA) (you are not required to complain to any administrative agency before bringing an EPA suit in court). EPA suits must be brought within 2 years (3 years in cases of willful violations) of the alleged EPA underpayment.

An information copy of this Notice of Right to Sue has been sent to the respondent(s) shown below.

Yellow Freight Systems
10301 South Harlem Avenue
Chicago Ridge, Illinois 60415

cc: (to respondent) On behalf of the Commission

☒ Copy of Charge

/s/ Kathleen M. Blunt Date 3-15-85
Typed Name and Title
of Issuing Official
KATHLEEN M. BLUNT
DISTRICT DIRECTOR

(June 28, 1985)

IN THE
CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, LAW DIVISION

No. 85 L 11199
#11

COLLEEN DONNELLY,
Plaintiff,

vs.

YELLOW FREIGHT SYSTEMS,
Defendant.

NOTICE OF MOTION

To: John J. Henely, Ltd.
Two North LaSalle Street
Chicago, IL 60602

On August 9, 1985 at 9:30 a.m., or soon thereafter as counsel may be heard, I shall appear before the Honorable William Quinlan, Room 2203 or any judge sitting in his stead, in the courtroom usually occupied by him in the Richard J. Daley Center, Chicago, Illinois, and then and there present the Defendant's Motion to Dismiss, a true and correct copy of which is attached hereto and herewith served upon you.

Name Steven J. Teplinsky, Esq.
BERMAN, FAGEL, HABER, MARAGOS
& ABRAMS
Address 140 S. Dearborn, Suite 1400
Telephone (312) 346-7500
Attorney for Defendant
City Chicago, Illinois 60603
Firm I.D. Number 90041

* * *

PROOF OF SERVICE BY MAIL

I, Carol A. Vosecky, a non-attorney, on oath state: I served this notice by mailing a copy to the above law firm at its designated address and depositing the same in the U.S. mail at 140 South Dearborn Street, Chicago, Illinois, at 5:00 p.m. on June 28, 1985, with proper postage prepaid.

/s/ Carol A. Vosecky

(If not the attorney)
Signed and sworn to before me June 28, 1985

/s/ Janie L. Gallina
Notary public

* * *

(June 28, 1985)

IN THE
CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, LAW DIVISION

No. 85 L 11199

COLLEEN DONNELLY,
Plaintiff,

vs.

YELLOW FREIGHT SYSTEMS,
Defendant.

MOTION TO DISMISS

Now comes Yellow Freight Systems, Inc. of Delaware, by its attorneys, Berman, Fagel, Haber, Maragos & Abrams, and moves this Court to dismiss the instant Complaint, with prejudice, pursuant to Section 2-615 of the Illinois Code of Civil Procedure. In support hereof, the following is submitted:

1. Plaintiff has filed a two-count Complaint alleging various violations of the Illinois Human Rights Act. (*Ill. Rev. Stat.*, Chapter 68, Paragraph 1-101 et seq. Count I alleges employment discrimination based upon sex by Defendant's failure to hire Plaintiff as a "loader" from November, 1982 until June 27, 1984. Count II alleges employment discrimination based upon sex since September 22, 1984.

2. Plaintiff fails to state a cause of action as a matter of law and the Complaint must be dismissed with prejudice.

The case is brought pursuant to the Human Rights Act. It is well established that grievances under that Act come solely within the jurisdiction of the Illinois Human Rights Commission. Except by way of Administrative Review, the Courts of this state have no jurisdiction to grant relief for violations of the policies embodied in the Act. *Armstrong v. Freeman United Coal Mining Company*, 112 Ill.App.3d 1020, 1022-23 (3rd. 1983).

3. Although Plaintiff alleges that the Court has jurisdiction pursuant to her "exhaustion of administrative remedies", the Complaint is clear on its face that such an exhaustion of remedies has not occurred. Plaintiff specifically alleges an exhaustion of remedies with the "*Equal Opportunity Employment Commission*" and attaches a copy of the Right to Sue Notice issued by that agency. The Equal Employment Opportunity Commission, however, is an arm of the Federal Government, whose jurisdiction is founded in Title 42 of the U.S.C.A. Notwithstanding whatever actions Plaintiff might have taken with the Equal Employment Opportunity Commission, she has not alleged the filing of any complaint with the Illinois Department of Human Rights.

Plaintiff's failure to exhaust her administrative remedies pursuant to the Human Rights Act bars her from bringing a direct cause of action in this Court. *Dilley v. Americana Healthcare Corporation*, 129 Ill.App.3d 537 (4th. 1984); *Thakkar v. Wilson Enterprises*, 120 Ill.App.3d 878, 882 (1st. 1983).

Furthermore, Plaintiff is forever barred from properly bringing an action within the purview of the Human Rights Act, which provides that a charge of discrimination be filed within 180 days after the date that a civil rights violation has been committed. This 180-day filing requirement is jurisdictional and as Plaintiff has failed to timely

file (ever file) a complaint with the Department of Human Rights, she is forever barred. *Lee v. Human Rights Commission*, 126 Ill.App.3d 666 (1st. 1984); *Beane v. Millers Mutual Insurance Association of Alton*, 90 Ill.App.3d 258, 261 (5th. 1980).

WHEREFORE, for the above and foregoing reasons, Defendant requests this Court to dismiss the above Complaint with prejudice, and for its costs so wrongfully sustained.

YELLOW FREIGHT SYSTEMS, INC.
OF DELAWARE

By: /s/ (Illegible)
One of its Attorneys

Steven J. Teplinsky, Esq.
BERMAN, FAGEL, HABER, MARAGOS
& ABRAMS
140 South Dearborn Street, Suite 1400
Chicago, Illinois 60603
(312) 346-7500

I.D. No. 90041

(July 17, 1985)

IN THE
CIRCUIT COURT OF COOK COUNTY, ILLINOIS

NO. 85 L 11199 (B)

COLLEEN DONNELLY,
Plaintiff,

vs.

YELLOW FREIGHT SYSTEMS,
Defendant.

NOTICE OF MOTION

To: Mr. Steven J. Teplinsky, Berman, Fagel, Haber, Maragos and Abrams, 140 South Dearborn Street, Chicago, IL 60603

On JULY 19, 1985 at 8:45 a.m., or soon thereafter as counsel may be heard, I shall appear before the Honorable JUDGE WILLIAM QUINLAN, or any judge sitting in his stead, in the courtroom usually occupied by him in ROOM 2203, RICHARD J. DALEY CENTER, CHICAGO, Illinois, and present the Plaintiff's Motion to File Amended Complaint at Law, instanter herewith served upon you.

Name JOHN J. HENELY, LTD.
Address TWO NORTH LASALLE STREET
Telephone 312-899-9090
Attorney for PLAINTIFF
City CHICAGO, IL 60602
Atty No. 91872

Copy received JULY 17, 1985, at .... m.

**BY: BERMAN, FAGEL, HABER,
MARAGOS AND ABRAMS**

PROOF OF SERVICE BY DELIVERY

I, MICHAEL RITCHIE, a non-attorney, on oath state: On July 17, 1985, I served this notice by delivering a copy personally to each person to whom it is directed.

.....

(If not the attorney)
Signed and sworn to before me JULY 17, 1985,

.....

Notary public

* * *

(July 17, 1985)

STATE OF ILLINOIS)
) SS:
COUNTY OF COOK)

IN THE
CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, LAW DIVISION

---

85 L 11199(B)

COLLEEN DONNELLY,
Plaintiff,

vs.

YELLOW FREIGHT SYSTEMS, INC.
Defendant.

MOTION TO FILE AMENDED COMPLAINT AT LAW

NOW COMES Plaintiff, COLLEEN DONNELLY, by her attorneys, JOHN J. HENELY, LTD., and moves this Honorable Court for the entry of an Order granting her leave to file her Amended Complaint at Law, instanter.

/s/ John J. Henely, Ltd.
ATTORNEYS FOR PLAINTIFF

JOHN J. HENELY, LTD., 91872
ATTORNEYS FOR PLAINTIFF
TWO NORTH LASALLE STREET
CHICAGO, IL 60602
312-899-9090

(July 17, 1985)

STATE OF ILLINOIS)
) SS:
COUNTY OF COOK)

IN THE
CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, LAW DIVISION

NO. 85 L 11199(B)

COLLEEN DONNELLY,
Plaintiff,

vs.

YELLOW FREIGHT SYSTEMS, INC.,
Defendant.

AMENDED COMPLAINT AT LAW

COUNT I

Plaintiff, COLLEEN DONNELLY, complaining of the defendant, YELLOW FREIGHT SYSTEMS, INC., alleges and says:

1. This action arises under the provisions of the Illinois Human Rights Act (Ill. Rev. Stat. Ch. 68, Par. 1-101, *et seq.* 1983). This court has jurisdiction of this action pursuant to Plaintiff's exhaustion of administrative remedies with the Equal Employment Opportunity Commission and its subsequent issuance of Notice of Right to Sue, a copy of which is attached hereto as Exhibit A.

2. Plaintiff, COLLEEN DONNELLY is, and at all times herein mentioned was, a female resident of the Village of Chicago Ridge, County of Cook and State of Illinois.

3. Defendant, YELLOW FREIGHT SYSTEMS, INC., is, and at all times herein mentioned was, a foreign corporation engaged in the business of transporting goods as a motor carrier in interstate commerce with district offices and place of business located at or near 10301 South Harlem Avenue, Chicago Ridge, Cook County, Illinois.

4. At all relevant times, defendant has employed within Illinois twenty or more employees during twenty or more calendar weeks within the preceding year of the acts complained of herein. Defendant was and is, therefore, an employer within the meaning of Section 2-101(B)(1)(a) of the Human Rights Act (Ill. Rev. Stat. Ch. 68, Sec. 2-101(B)(1)(a).

5. On or about November, 1982, Plaintiff sought employment at Defendant's place of business as a "loader."

6. Although Plaintiff was fully qualified for the applied for position, Defendant failed to hire Plaintiff on the basis of her sex and as such was in violation of the Human Rights Act, to wit:

(a) Failed to hire Plaintiff on the basis of her sex, in violation of Sec. 2-102(A), Ch. 68 of the Ill. Rev. Stat.;

(b) Failed to hire Plaintiff on the basis of her sex despite weekly repeated calls to Defendant requesting employment;

(c) Failed to hire Plaintiff on the basis of her sex while Defendant continued to hire at least twenty-five

men since her application for employment was denied;

(d) Failed to hire Plaintiff on the basis of her sex while hiring men even though her qualifications for the position(s) is similar or equal to those of the men hired.

7. On June 27, 1984, Defendant hired Plaintiff.

8. As a result of Defendant's failure to hire Plaintiff in its employ because of her sex, Plaintiff was caused to suffer unpaid wages and compensation, from November, 1982 to her ultimate hiring date of June 27, 1984 at Defendant's employ, in the sum of $30,000.00, which sum would have been paid by Defendant to Plaintiff, but for Defendant's wrongful act.

WHEREFORE, Plaintiff prays as follows:

1. That this Court award Plaintiff the sum of $30,000.00 as unpaid wages and compensation for the loss of wages she sustained from November, 1982 to June 27, 1984.

2. That this Court award Plaintiff retroactive seniority to that which she would be entitled to had she been hired in November, 1982, and such other fringe benefits as Plaintiff may have been denied.

3. That this Court award Plaintiff a reasonable amount for attorney's fees and costs of this action pursuant to Ill. Rev. Stat., Ch. 68, Sec. 8-108(G).

4. That this Court grant Plaintiff such other further relief as may be just, equitable, and make Plaintiff whole.

COUNT II

Plaintiff, COLLEEN DONNELLY, complaining of Defendant, YELLOW FREIGHT SYSTEMS, INC., alleges and says:

1. This action arises under the provisions of the Illinois Human Rights Act (Ill. Rev. Stat. Ch. 68, Par. 1-101, *et seq.* 1983). This court has jurisdiction of this action pursuant to Plaintiff's exhaustion of administrative remedies with the Equal Employment Opportunity Commission and its subsequent issuance of Notice of Right to Sue, a copy of which is attached hereto as Exhibit B.

2. Plaintiff, COLLEEN DONNELLY is, and at all times herein mentioned was, a female resident of the Village of Chicago Ridge, County of Cook and State of Illinois.

3. Defendant, YELLOW FREIGHT SYSTEMS, INC., is, and at all times herein mentioned was, a foreign corporation engaged in the business of transporting goods as a motor carrier in interstate commerce with district offices and place of business located at or near 10301 South Harlem Avenue, Chicago Ridge, Cook County, Illinois.

4. At all relevant times, defendant has employed within Illinois twenty or more employees during twenty or more calendar weeks within the preceding year of the acts complained of herein. Defendant was, and is, therefore, an employer within the meaning of Section 2-101(B)(1)(a) of the Human Rights Act (Ill. Rev. Stat. Ch. 68, Sec. 2-101(B)(1)(a).

5. On June 27, 1984, Plaintiff began employment with Defendant as a loader.

6. That since September 27, 1984, Defendant has engaged in conduct discriminating against Plaintiff on the basis of her sex, to wit:

(a) As of September 27, 1984, Defendant restricted Plaintiff to two ten-minute breaks during working hours, whereas males are permitted two, fifteen-

minute breaks and one fifteen minute wash-up break at the end of the day;

(b) Defendant has restricted Plaintiff to two ten-minute breaks, although the union bargaining agreement calls for two fifteen-minute breaks and a wash-up break;

(c) That Plaintiff, as the only female employed as loader is the only person in that position to receive said disparate treatment;

(d) That Plaintiff has received no explanation for the difference in treatment;

(e) That Plaintiff continues to receive other disparate treatment in her employment based upon her sex and with the intent to force her voluntary resignation from her employment;

(f) That Defendant's disparate treatment was done in retaliation against Plaintiff for filing a charge of sex discrimination in failure to hire her, in violation of Sec. 6-101(A), Ch. 68 of the Illinois Human Rights Act. (Ill. Rev. Stat. Ch. 68, Sec. 6-101(A) 1983).

7. That as a result of Defendant's foregoing treatment, Plaintiff has suffered loss of actual damages and the full and equal enjoyment of the goods, services, facilities, privileges and advantages of the Defendant.

WHEREFORE, Plaintiff prays as follows:

1. That this Court award Plaintiff a sum of money for actual damages sustained as a result of Defendant's unlawful sex discrimination, disparate treatment and continuing harassment.

2. That this Court enter an order compelling Defendant to cease and desist from any further unlawful discrimination.

3. That this Court award Plaintiff a reasonable amount for attorney's fees and costs of this action pursuant to Ill. Rev. Stat. Ch. 68, Sec. 8-108(G).

4. That this Court grant Plaintiff such other further relief as may be just, equitable and make Plaintiff whole.

COUNT III

Plaintiff, COLLEEN DONNELLY, complaining of the Defendant, YELLOW FREIGHT SYSTEMS, INC., alleges and says:

1. This action arises under the provisions of 42 U.S.C. §§1981, 1983 and 1985 and Title VII of the 1964 Civil Rights Act 42 U.S.C. §2000(e) *et seq.* This Court has jurisdiction of this action pursuant to Plaintiff's exhaustion of administrative remedies with the Equal Employment Opportunity Commission and its subsequent issuance of Notice of Right to Sue, a copy of which is attached hereto as Exhibit A.

2. Plaintiff, COLLEEN DONNELLY is, and at all times herein mentioned was, a female resident of the Village of Chicago Ridge, County of Cook and State of Illinois.

3. Defendant, YELLOW FREIGHT SYSTEMS, INC., is, and at all times herein mentioned was, a foreign corporation engaged in the business of transporting goods as a motor carrier in interstate commerce with district offices and place of business located at or near 10301 South Harlem Avenue, Chicago Ridge, Cook County, Illinois.

4. At all relevant times, defendant has employed within Illinois fifteen or more employees during twenty or more calendar weeks within the preceding year of the acts complained of herein. Defendant was and is, therefore, an employer within the meaning of Section 2000(e)(b) of the 1964 Civil Rights Act (42 U.S.C. §2000(e)(b)).

5. On or about November, 1982, Plaintiff sought employment at Defendant's place of business as a "loader."

6. Although Plaintiff was fully qualified for the applied for position, Defendant failed to hire Plaintiff on the basis of her sex and as such was in violation of the Human Rights Act, to wit:

(a) Failed to hire Plaintiff on the basis of her sex, in violation of Section 2000e-2(a)(1) of the 1964 Civil Rights Act;

(b) Failed to hire Plaintiff on the basis of her sex despite weekly repeated calls to Defendant requesting employment;

(c) Failed to hire Plaintiff on the basis of her sex while Defendant continued to hire at least twenty-five men since her application for employment was denied;

(d) Failed to hire Plaintiff on the basis of her sex while hiring men, even though her qualifications for the position(s) are similar or equal to those of the men hired.

7. On June 27, 1985, Defendant hired Plaintiff.

8. As a result of Defendant's failure to hire Plaintiff in its employ because of her sex, Plaintiff was caused to suffer unpaid wages and compensation, from November, 1982 to her ultimate hiring date of June 27, 1984 at Defen-

dant's employ, in the sum of $30,000.00, which sum would have been paid by Defendant to Plaintiff, but for Defendant's wrongful act.

WHEREFORE, Plaintiff prays as follows:

1. That this Court award Plaintiff the sum of $30,000.00 as unpaid wages and compensation for the loss of wages she sustained from November, 1982 to June 27, 1984.

2. That this Court award Plaintiff retroactive seniority to that which she would be entitled to had she been hired in November, 1982, and such other fringe benefits as Plaintiff may have been denied.

3. That this Court award Plaintiff a reasonable amount for attorney's fees and costs of this action.

4. That this Court grant Plaintiff such other further relief as may be just, equitable, and make Plaintiff whole.

COUNT IV

Plaintiff, COLLEEN DONNELLY, complaining of Defendant, YELLOW FREIGHT SYSTEMS, INC., alleges and says:

1. This action arises under the provisions of 42 U.S.C. §§1981, 1983 and 1985 and Title VII of the 1964 Civil Rights Act, 42 U.S.C. §2000(e) *et seq.* This Court has jurisdiction of this action pursuant to Plaintiff's exhaustion of administrative remedies with the Equal Employment Opportunity Commission and its subsequent issuance of Notice of Right to Sue, a copy of which is attached hereto as Exhibit B.

2. Plaintiff, COLLEEN DONNELLY is, and at all times herein mentioned was, a female resident of the Village of Chicago Ridge, County of Cook and State of Illinois.

3. Defendant, YELLOW FREIGHT SYSTEMS, INC., is and at all times herein mentioned was, a foreign corporation engaged in the business of transporting goods as a motor carrier in interstate commerce with district offices and place of business located at or near 10301 South Harlem Avenue, Chicago Ridge, Cook County, Illinois.

4. At all relevant times, defendant has employed within Illinois fifteen or more employees during twenty or more calendar weeks within the preceding year of the acts complained of herein. Defendant was, and is, therefore, an employer within the meaning of Section 2000e(b) of the 1964 Civil Rights Act (42 U.S.C., §2000e(b)).

5. On June 27, 1984, Plaintiff began employment with Defendant as a loader.

6. That since September 27, 1984, Defendant has engaged in conduct discriminating against Plaintiff on the basis of her sex, to wit:

(a) As of September 27, 1984, Defendant restricted Plaintiff to two ten-minute breaks during working hours, whereas males are permitted two, fifteen-minute breaks and one fifteen minute wash-up break at the end of the day, in violation of Section 2000 e-2(a)(2) of the 1964 Civil Rights Act;

(b) Defendant has restricted Plaintiff to two ten-minute breaks, although the union bargaining agreement calls for two fifteen-minute breaks and a wash-up break, in violation of Section 2000 e-2 (a) (2) of the 1964 Civil Rights Act;

(c) That Plaintiff, as the only female employed as loader is the only person in that position to receive said disparate treatment;

(d) That Plaintiff has received no explanation for the difference in treatment;

(e) That Plaintiff continues to receive other disparate treatment in her employment based upon her sex and with the intent to force her voluntary resignation from her employment;

(f) That Defendant's disparate treatment was done in retaliation against Plaintiff for filing a charge of sex discrimination in failure to hire her, in violation of Section 2000e3(a) of the 1964 Civil Rights Act (42 U.S.C. §2000e-3(a)).

7. That as a result of Defendant's foregoing treatment, Plaintiff has suffered loss of actual damages and the full and equal enjoyment of the goods, services, facilities, privileges and advantages of the Defendant.

WHEREFORE, Plaintiff, prays as follows:

1. That this Court award Plaintiff a sum of money for actual damages sustained as a result of Defendant's unlawful sex discrimination, disparate treatment and continuing harassment.

2. That this Court enter an order compelling Defendant to cease and desist from any further unlawful discrimination.

3. That this Court award Plaintiff a reasonable amount for attorney's fees and costs of this action.

4. That this Court grant Plaintiff such other further relief as may be just, equitable and make Plaintiff whole.

/s/ John J. Henely, Ltd.
Attorneys for Plaintiff

JOHN J. HENELY, LTD., 91872
ATTORNEYS FOR PLAINTIFF
TWO NORTH LASALLE STREET
CHICAGO, IL 60602
312-899-9090

Exhibits A and B were printed earlier in this Joint Appendix as attachments to the Complaint at Law (May 22, 1985), see pp. 11-16.

(July 23, 1985)

IN THE
CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, LAW DIVISION

No. 85 L 11199

COLLEEN DONNELLY,
Plaintiff,

vs.

YELLOW FREIGHT SYSTEMS, INC.
Defendant.

RESPONSE AND OBJECTION TO PLAINTIFF'S MOTION FOR LEAVE TO FILE AMENDED COMPLAINT

Now comes Yellow Freight Systems, Inc., by its attorneys, Berman, Fagel, Haber, Maragos & Abrams, and for its response and objection to Plaintiff's Motion for Leave to File Amended Complaint, states as follows:

1. Counts I and II

Counts I and II of Plaintiff's proposed Amended Complaint are absolutely identical to Plaintiff's original Complaint filed on May 22, 1985. Those counts are presently subject to Defendant's Motion to Dismiss with prejudice set for hearing on August 9, 1985. The basis of said motion is the failure of the Plaintiff to exhaust administrative remedies. As these counts in the Amended Complaint are no different than those already pending and subsequent to the pending motion, there is no reason to refile Counts I and II except to further delay disposition of Defendant's Motion.

II. Counts III and IV.

The proposed Amended Complaint seeks to add Counts III and IV. Both counts allege that:

> "This action arises under the provisions of 42 U.S.C., Section 1981, 1983, and 1985 and Title VII of the 1964 Civil Rights Act 42 U.S.C., Section 2000 et seq. This Court has jurisdiction of this action pursuant to Plaintiff's exhaustion of administrative remedies with the Equal Employment Opportunity Commission and its subsequent issuance of Notice of Right to Sue. . .".

It is apparent upon a review of the proposed Amendment that this Court has no jurisdiction and that the proposed counts state no cognizable actions.

A. Title VII Violations.

The crux of Plaintiff's proposed Counts III and IV are that she has been discriminated in employment on the basis of her sex. Although she pleads sections 1981, 1983 and 1985 of 42 U.S.C., it is clear that her action, if any, is founded upon the purported Title VII violation. This Court, however, has no jurisdiction over Title VII actions in that jurisdiction is possessed *exclusively* by the Federal Courts. *Dyer v. Grief Bros, Inc.*, 755 F.2d 1391, 1393 (9th. 1985); *Valenzula v. Kraft*, 739 F.2d 434 (9th. 1984).

B. 42 U.S.C. 1981, 1983 and 1985.

Plaintiff additionally states that the actions in Counts III and IV are also brought pursuant to 42 U.S.C. 1981, 1983 and 1985. Similarly, she fails to allege on the face of the Complaint any cause of action which would entitle her to proceed. 42 U.S.C. 1981 applies *only* to racial discrimination. *Waller v. International Harvester*, 578

F.Supp. 309, 314 (N.D. Ill. 1984); *Nichelson v. Quaker Oats*, 573 F.Supp. 1209, 1219 (W.D. Tenn. 1983). The proposed cause of action alleges only discrimination based upon sex.

Additionally, Plaintiff's proposed Amended Counts III and IV allege violations of 42 U.S.C. 1983. It is well established that suits brought pursuant to 1983 must be directed against actions done under color of state law, or state action. *Mitchum v. Foster*, 92 S. Ct. 2151, 2162. There is no 1983 liability for private persons. *Guedry v. Ford*, 431 F.2d 660, 664 (5th. 1970). The proposed Counts III and IV make no allegations of any state action, rather seek redress only against Defendant, a private corporation.

Finally, Plaintiff seeks to establish her causes of action pursuant to 42 U.S.C. 1985. The United States Supreme Court has stated, however, that 1985 may not be invoked to redress Title VII violations. *Great American Federal Savings & Loan v. Novotny*, 99 S. Ct. 2345, 2352. Furthermore, 1985 provides a remedy for *conspiracies* to deprive one's civil rights. Here, of course, there is no allegation of conspiracy and the proposed Complaint fails to state any action.

III. Conclusion.

It is apparent that there exist no legal theories upon which any of the proposed remedies can state a cause of action, or that this Court even has jurisdiction. No reasons, therefore, exist to permit the filing of the Amended Complaint under these circumstances.

Respectfully submitted,

By: /s/ (Illegible)
Attorneys for Defendant

Leonard R. Kofkin, Esq.
Steven J. Teplinsky, Esq.
BERMAN, FAGEL, HABER, MARAGOS & ABRAMS
140 South Dearborn Street, Suite 1400
Chicago, Illinois 60603
(312) 346-7500

I.D. No. 90041

PROOF OF SERVICE BY MAIL

Steven J. Teplinsky (an attorney, certifies) being first duly sworn on oath, deposes and states that (s)he served the above and foregoing RESPONSE AND OBJECTION TO PLAINTIFF'S MOTION FOR LEAVE TO FILE AMENDED COMPLAINT to which this attached, by mailing a true and correct copy thereof to:

JOHN J. HENELY, LTD.
Two North LaSalle Street
Chicago, Illinois 60602

in an envelope addressed to each of them, postage prepaid, on the 26th day of July, 1985, in the U.S. Government mail at 140 S. Dearborn Street, Chicago, Illinois, before the hour of 5:00 p.m. on said date.

/s/ (Illegible)

Subscribed and Sworn to before me this 26th day of July, 1985.

/s/ Carol A. Vosecky
Notary Public

• • •

(Received September 20, 1985)

IN THE
DISTRICT COURT OF THE UNITED STATES FOR
THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

No. 85 C 7195
HONORABLE JUDGE LEIGHTON

COLLEEN DONNELLY,
Plaintiff,

vs.

YELLOW FREIGHT SYSTEMS, INC.,
Defendant.

NOTICE OF FILING

TO: Berman, Fagel, Haber, Maragos & Abrams, 140 South Dearborn Street, Chicago, IL 60603

PLEASE TAKE NOTICE that on the 20th day of September, 1985, we filed with the Clerk of the United States District Court for the Northern District of Illinois, Eastern Division, the: Plaintiff's Amended Complaint at Law, a copy of which pleading is attached and served upon you.

/s/ John J. Henely, Ltd.
JOHN J. HENELY, LTD.
Attorneys for Plaintiff(s)
75 EAST WACKER DRIVE
SUITE 2200
Chicago, Illinois 60602
312-263-1733

The undersigned, being first duly sworn on oath, deposes and says that she served a copy of the above Notice, together with all necessary documents, upon the above-named attorney(s) by enclosing a true and correct copy thereof in a duly addressed, postage prepaid envelope, and depositing same in the U.S. Mail chute at Two North LaSalle Street, Chicago, Illinois, before the hour of 5:00 P.M. on the 20th day of September, 1985.

/s/ Cindy A. Sesso

SUBSCRIBED AND SWORN TO before me this 20th day of September, 1985.

/s/ (Illegible)

(Received September 20, 1985)

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

NO. 85 C 7195
HONORABLE JUDGE LEIGHTON

COLLEEN DONNELLY,
Plaintiff,

vs.

YELLOW FREIGHT SYSTEMS, INC.,
Defendant.

AMENDED COMPLAINT AT LAW

COUNT I

Plaintiff, COLLEEN DONNELLY, complaining of the Defendant, YELLOW FREIGHT SYSTEMS, INC., alleges and says:

1. This action arises under the provisions of Title VII of the 1964 Civil Rights Act 42 U.S.C., §2000(e) *et seq.* This Court has jurisdiction of this action pursuant to Plaintiff's exhaustion of administrative remedies with the Equal Employment Opportunity Commission and its subsequent issuance of Notice of Right to Sue, a copy of which is attached hereto as Exhibit A.

2. That this action is a removal by defendant of plaintiff's original action filed in the Circuit Court of Cook County, Court No. 85 L 11199 pursuant to 28 U.S.C. §1441(b),(C), filed on May 22, 1985 and Plaintiff's motion to file an Amended Complaint on August 9, 1985.

3. Plaintiff, COLLEEN DONNELLY is, and at all times herein mentioned was, a female resident of the Village of Chicago Ridge, County of Cook and State of Illinois.

4. Defendant, YELLOW FREIGHT SYSTEMS, INC., is, and at all times herein mentioned was, a foreign corporation engaged in the business of transporting goods as a motor carrier in interstate commerce with district offices and place of business located at or near 10301 South Harlem Avenue, Chicago Ridge, Cook County, Illinois.

5. At all relevant times, defendant has employed within Illinois fifteen or more employees during twenty or more calendar weeks within the preceding year of the acts complained of herein. Defendant was, and is, therefore, an employer within the meaning of Section 2000(e)(b) of the 1964 Civil Rights Act (42 U.S.C. §2000(e)(b)).

6. On or about November, 1982, Plaintiff sought employment at Defendant's place of business as a "loader."

7. Although Plaintiff was fully qualified for the applied-for position, Defendant failed to hire Plaintiff on the basis of her sex and as such was in violation of the Civil Rights Act, to wit:

(a) Failed to hire Plaintiff on the basis of her sex, in violation of Section 2000e-2(a)(1) of the 1964 Civil Rights Act;

(b) Failed to hire Plaintiff on the basis of her sex despite weekly repeated calls to Defendant requesting employment;

(c) Failed to hire Plaintiff on the basis of her sex while Defendant continued to hire at least twenty-five men since her application for employment was denied;

(d) Failed to hire Plaintiff on the basis of her sex while hiring men, even though her qualifications for the position(s) are similar or equal to those of the men hired.

8. On June 27, 1984, Defendant hired Plaintiff.

9. As a result of Defendant's failure to hire Plaintiff in its employ because of her sex, Plaintiff was caused to suffer unpaid wages and compensation, from November, 1982 to her ultimate hiring date of June 27, 1984 at Defendant's employ, in the sum of $30,000.00, which sum would have been paid by Defendant to Plaintiff, but for Defendant's wrongful act.

WHEREFORE, Plaintiff prays as follows:

1. That this Court award Plaintiff the sum of $30,000.00 as unpaid wages and compensation for the loss of wages she sustained from November, 1982 to June 27, 1984.

2. That this Court award Plaintiff retroactive seniority to that which she would be entitled to had she been hired in November, 1982, and such other fringe benefits as Plaintiff may have been denied.

3. That this Court award Plaintiff a reasonable amount for attorney's fees and costs of this action.

4. That this Court grant Plaintiff such other further relief as may be just, equitable, and make Plaintiff whole.

COUNT II

Plaintiff, COLLEEN DONNELLY, complaining of defendant, YELLOW FREIGHT SYSTEMS, INC., alleges and says:

1. This action arises under the provisions of Title VII of the 1964 Civil Rights Act, 42 U.S.C. §2000(e) *et seq.* This Court has jurisdiction of this action pursuant to Plaintiff's exhaustion of administrative remedies with the Equal Employment Opportunity Commission and its subsequent issuance of Notice of Right to Sue, a copy of which is attached hereto as Exhibit B.

2. That this action is a removal by defendant of plaintiff's original action filed in the Circuit Court of Cook County, Court No. 85 L 11199 pursuant to 28 U.S.C. §1441(b),(C), filed on May 22, 1985 and Plaintiff's motion to file an Amended Complaint on August 9, 1985.

3. Plaintiff, COLLEEN DONNELLY is, and at all times herein mentioned was, a female resident of the Village of Chicago Ridge, County of Cook and State of Illinois.

4. Defendant, YELLOW FREIGHT SYSTEMS, INC., is, and at all times herein mentioned was, a foreign corporation engaged in the business of transporting goods as a motor carrier in interstate commerce with district offices and place of business located at or near 10301 South Harlem Avenue, Chicago Ridge, Cook County, Illinois.

5. At all relevant times, defendant has employed within Illinois fifteen or more employees during twenty or more calendar weeks within the preceding year of the acts complained of herein. Defendant was, and is, therefore, an employer within the meaning of Section 2000e(b) of the 1964 Civil Rights Act (42 U.S.C., §2000 e(b)).

6. On June 27, 1984, Plaintiff began employment with Defendant as a loader.

7. That since September 27, 1984, Defendant has engaged in conduct discriminating against Plaintiff on the basis of her sex, to wit:

(a) As of September 27, 1984, Defendant restricted Plaintiff to two ten-minute breaks during working hours, whereas males are permitted two, fifteen-minute breaks and one fifteen minute wash-up break at the end of the day, in violation of Section 2000 e-2(a)(2) of the 1964 Civil Rights Act;

(b) Defendant has restricted Plaintiff to two ten-minute breaks, although the union bargaining agreement calls for two fifteen-minute breaks and a wash-up break, in violation of Section 2000 e-2 (a)(2) of the 1964 Civil Rights Act;

(c) That Plaintiff, as the only female employed as loader is the only person in that position to receive said disparate treatment;

(d) That Plaintiff has received no explanation for the difference in treatment;

(e) That Plaintiff continues to receive other disparate treatment in her employment based upon her sex and with the intent to force her voluntary resignation from her employment;

(f) That Defendant's disparate treatment was done in retaliation against Plaintiff for filing a charge of sex discrimination in failure to hire her, in violation of Section 2000e-3(a) of the 1964 Civil Rights Act (42 U.S.C. §2000e-3(a)).

8. That as a result of Defendant's foregoing treatment, Plaintiff has suffered loss of actual damages and the full and equal enjoyment of the goods, services, facilities, privileges and advantages of the Defendant.

WHEREFORE, Plaintiff, prays as follows:

1. That this Court award Plaintiff a sum of money for actual damages sustained as a result of Defendant's

unlawful sex discrimination, disparate treatment and continuing harassment.

2. That this Court enter an order compelling Defendant to cease and desist from any further unlawful discrimination.

3. That this Court award Plaintiff a reasonable amount for attorney's fees and costs of this action.

4. That this Court grant Plaintiff such other further relief as may be just, equitable and make Plaintiff whole.

/s/ John J. Henely, Ltd.
Attorneys for Plaintiff

JOHN J. HENELY, LTD.
ATTORNEYS FOR PLAINTIFF
75 EAST WACKER DRIVE
SUITE 2200
CHICAGO, IL 60601
312-263-1733

Exhibits A and B were printed earlier in this Joint Appendix as attachments to the Complaint at Law (May 22, 1985), see pp. 11-16.

No. 89-431

In the Supreme Court of the United States

OCTOBER TERM, 1989

YELLOW FREIGHT SYSTEM, INC.,
Petitioner,

vs.

COLLEEN DONNELLY,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF OF PETITIONER

JEFFREY IVAN PASEK
(Counsel of Record)
ALAN M. LERNER
JOHN F. LICARI
COHEN, SHAPIRO, POLISHER, SHIEKMAN and COHEN
12 South 12th Street
Philadelphia, Pennsylvania 19107
(215) 922-1300

RONALD E. SANDHAUS
10990 Roe Avenue
Overland Park, Kansas 66207
(913) 345-3000
Attorneys for Petitioner

Of Counsel:
STEVEN J. TEPLINSKY
LEONARD R. KOFKIN
FAGEL, HABER & MARAGOS
140 South Dearborn, Suite 1400
Chicago, Illinois 60603
(312) 346-7500

Petition for Certiorari Filed September 11, 1989
Certiorari Granted November 6, 1989

50 pp

QUESTION PRESENTED

Whether federal courts have exclusive jurisdiction over claims arising under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e *et seq.*

LIST OF PARTIES AND CORPORATIONS

1. Yellow Freight System, Inc. of Delaware. Yellow Freight System, Inc. is a wholly owned subsidiary of Yellow Freight System, Inc. of Delaware.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Congressional Material

Rules

Miscellaneous

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit dated April 28, 1989 is reported as 874 F.2d 402. (Appendix to Petition for Writ of Certiorari, hereinafter "A", at A-1 to A-19). In an unpublished order dated July 17, 1989, the United States Court of Appeals for the Seventh Circuit denied Yellow Freight's Petition for Rehearing with Suggestion for Rehearing En Banc. (A-20). The opinion of the District Court of the Northern Distri of Illinois entered on March 17, 1988 adopting the Mag trate's Report is published at 682 F. Supp. 374. (A-24). The Report and Recommendation of the United States Magistrate entered December 10, 1987, is not reported. (A-26 to A-34). The opinion of the District Court entered November 22, 1985 on the issue of jurisdiction in Title VII actions is not reported. The order of the Circuit Court of Cook County, Illinois, dismissing plaintiff's Complaint with prejudice and continuing her contested motion for leave to file amended Complaint, entered August 9, 1985 is not reported. (A-40).

JURISDICTION

The judgment of the United States Court of Appeals for the Seventh Circuit was entered on April 28, 1989 (A-1) and the Petition for Rehearing was denied on July 17, 1989. (A-20). The petition for Writ of Certiorari was filed on September 11, 1989, and this Court granted certiorari, limited to Question 1 presented in the petition, on November 6, 1989. This Court has jurisdiction to review the issues presented herein on Writ of Certiorari pursuant to 28 U.S.C. § 1254(1).

STATUTES INVOLVED

Section 706(f) of Title VII of the Civil Rights Act of 1964, as amended ("Title VII"), 42 U.S.C. § 2000e-5(f) and Section 706(j) of Title VII, 42 U.S.C. § 2000e-5(j) are set forth in the Petition for Certiorari.

STATEMENT OF THE CASE

This case was initially instituted in the Circuit Court of Cook County, Illinois on May 22, 1985. Asserting that Yellow Freight had wrongfully refused to hire her for a job as a dock worker, Donnelly brought a two-count Complaint alleging sex discrimination in violation only of the Illinois Human Rights Act (Ill. Rev. Stat., Chapter 68, § 1-101 *et seq.* (1983)). Because Donnelly had not attempted to exhaust her administrative remedies, Yellow Freight filed a motion to dismiss the Complaint for lack of jurisdiction. Donnelly then sought leave to file an amended Complaint.

On August 9, 1985, the Circuit Court entered an agreed order dismissing the Complaint with prejudice and continuing Donnelly's contested motion for leave to file an amended Complaint (A-40). On August 14, 1985, Yellow Freight removed the case to the United States District Court pursuant to 28 U.S.C. § 1441(b) and (c).

On September 13, 1985, the District Court granted Donnelly leave to file an amended Complaint. On September 20, 1985, Donnelly, for the first time, filed a Complaint alleging violations of Title VII arising out of the same facts which served as a basis for her claims under the Illinois Human Rights Act.

Yellow Freight filed a motion to dismiss the amended Complaint for lack of jurisdiction on the grounds that Donnelly's Title VII claims were untimely (Joint Appendix, hereinafter "J.A." at 17-21). In support of its motion,

Yellow Freight argued that any filing of a Title VII claim in the Illinois Circuit Court, whether before or after the 90 day limit, was ineffective because the federal courts have exclusive jurisdiction over Title VII claims.

Yellow Freight's motion to dismiss the Amended Complaint was denied by the District Court. (A-35 to A-39). Applying this Court's test in *Gulf Offshore Co. v. Mobil Oil*, 453 U.S. 473 (1981), the district court found that Title VII did not contain any explicit directive from Congress vesting the federal courts with exclusive jurisdiction over Title VII claims. The district court also found, without citation to the legislative history, that there was no clear indication from the legislative history that Congress intended to confer on the federal courts exclusive jurisdiction over Title VII actions. The court also concluded that there was no disabling incompatibility between the exercise of concurrent state court jurisdiction over Title VII actions and the federal interests because Title VII was not intended to be an exclusive remedy for employment discrimination.

Inasmuch as Yellow Freight had hired Donnelly before she filed suit, a trial was held before a magistrate on the issue of backpay liability. Donnelly was awarded backpay for the time from when she should have been hired until her actual date of hire. (A-26 to A-34). The district court adopted the magistrate's report. (A-23 to A-25).

On appeal to the United States Court of Appeals for the Seventh Circuit, Yellow Freight argued that any filing in the Illinois state court could not toll the statute of limitations because the federal courts have exclusive jurisdiction over Title VII claims.

The Seventh Circuit rejected Yellow Freight's argument concluding that state courts have concurrent jurisdiction over Title VII claims. (A-11). Applying this court's decision in *Gulf Offshore*, the Seventh Circuit found

that Congress did not explicitly confer exclusive jurisdiction over Title VII claims on the federal courts. The court then concluded that the language and legislative history of Title VII did not demonstrate that Congress implicitly conferred exclusive jurisdiction over Title VII claims on the federal courts. The court reasoned that the fact that the legislative history consistently referred to the federal courts as the forum for Title VII claims did not unmistakably establish that Congress intended to deprive states of jurisdiction over Title VII claims. Rather, the court found that such references merely established that Congress intended to grant federal courts jurisdiction over Title VII claims.

The Seventh Circuit also placed significance on the fact that Title VII was not intended to be the exclusive remedy for employment discrimination. The Seventh Circuit found that there was no incompatibility between concurrent state court jurisdiction over Title VII claims and the federal interests. The court stated that there was no reason to believe that concurrent jurisdiction would lead to an arbitrary development of Title VII law because state courts were bound to follow the large body of Title VII case law under the supremacy clause. The Seventh Circuit concluded that state court judges were sufficiently competent to deal with Title VII claims because most states had enacted employment discrimination laws which are regularly litigated in state courts. The Seventh Circuit also found that there was no reason to believe that state courts would be hostile to Title VII claims because state courts have concurrent jurisdiction over § 1983 claims. The court reasoned that there was no reason to believe that the courts would be hostile to Title VII claims, but not hostile to § 1983 claims since similar policy considerations underlie both statutes.

The Seventh Circuit also found that the fact that a state legislature may not provide a forum for Title VII claims did not preclude the exercise of concurrent jurisdiction because Congress can constitutionally require a state court to hear a federal cause of action.

In reaching its decision, the Seventh Circuit also reversed its earlier decision in *Brown v. Reliable Sheet Metal Works, Inc.*, 852 F.2d 932 (7th Cir. 1988), and held that a state court filing tolls the 90 day statute of limitations even where a plaintiff does not exhaust her state administrative remedies.

Yellow Freight filed a petition for rehearing with suggestion for rehearing en banc with the Seventh Circuit. The court denied the petition on July 17, 1989. (A-20 to A-21).

SUMMARY OF ARGUMENT

Although there is a presumption that state courts share concurrent jurisdiction over federal statutory claims, the presumption can be overcome by an explicit statutory directive, by an unmistakable implication from legislative history, or by a clear incompatibility between state-court jurisdiction and federal interests. *Gulf Offshore Co. v. Mobil Oil Corp.*, 453 U.S. 473 (1981). Factors generally recommending exclusive jurisdiction over an area of federal law include the desirability of uniform interpretation, the expertise of federal judges in federal law and the assumed greater hospitality of federal courts to peculiarly federal claims. *Id.* at 483-84.

In enacting Title VII of the Civil Rights Act of 1964, 78 Stat. 253 (1964), Congress did not explicitly state its intent that jurisdiction over Title VII actions rest exclusively in the federal courts. The legislative history, however, contains unmistakable evidence of this intent. The major congressional debate focused on whether en-

forcement would proceed through an administrative body with cease-and-desist authority or through suits in the federal district courts. Although the House Committee favored use of the cease-and-desist approach, a substantial number of committee members "prefer that the ultimate determination of discrimination rest with the Federal judiciary." H.R. Rep. 914, 88th Cong., 1st Sess. (separate views of Rep. McCullouch) reprinted in United States Equal Employment Opportunity Commission, Legislative History of Titles VII and XI of the Civil Rights Act of 1964 (herein cited as "1964 Leg. Hist.") at 2150. The McCullouch approach was eventually adopted.

The Senate bill was the subject of a series of compromises hammered out on the Senate floor. Proponents first eliminated the proposal for the EEOC to exercise cease-and-desist power in favor of its right to bring suit "in a federal district court." If the Commission decided not to sue, the party allegedly discriminated against would have a right to "bring his own suit in Federal court." In either case the suit "would proceed in the usual manner for litigation in the Federal courts." Interpretive Memorandum of Senators Clark and Case, 1964 Leg. Hist. at 3044.

The final compromise eliminated the right of the EEOC to bring suit on behalf of an aggrieved individual. If the Commission was not able to obtain voluntary compliance, it was to notify the person aggrieved, who then had 30 days to "bring his own suit in Federal court for enforcement of his rights." *Id.* at 3004 (Remarks of Sen. Humphrey).

The 1972 amendments to Title VII continued the policy of exclusive federal jurisdiction over Title VII claims. In the House of Representatives, Representative Erlenborn offered an amendment substituting court enforcement for the cease-and-desist approach. In explaining the proposal, he made it clear that "my bill would require any case to be tried there [the Federal district courts] . . . ." Senate Committee on Labor and Public Welfare, Subcommittee on Labor, Legislative History of the Equal Employment Opportunity Act of 1972 (herein cited as "1972 Leg. Hist.") at 219. The House adopted the Erlenborn substitute.

The Senate also rejected the cease-and-desist approach in favor of a court enforcement mechanism proposed by Senator Dominick. Senator Dominick expressed that his amendment would "vest adjudicatory power where it belongs—in impartial judges shielded from the political winds by life tenure." *Id.* at 549. Opponents of the Dominick amendment understood that it was "[i]n the district courts, where under the Dominick amendment suits would have to be filed . . . ." *Id.* at 905 (remarks of Sen. Javits). The legislative history of both the House and Senate bills reveals that Congress understood federal courts would have exclusive jurisdiction over Title VII.

As finally adopted by Congress the 1972 amendments to § 706 contain several provisions which are clearly incompatible with concurrent state court jurisdiction over Title VII claims. Thus, § 706(j) provides that any Title VII action "shall be subject to appeal as provided in Sections 1291 and 1292, Title 28." 42 U.S.C. § 2000e-5(j). These sections govern appeals to the federal courts of appeals. Because Congress could not have intended that actions brought in state courts be appealed to the federal courts of appeals, § 706(j) unmistakably implies that Congress intended to vest exclusive jurisdiction in the federal courts.

Title VII also contains several procedural devices that Congress considered important adjuncts to ensure that rights under Title VII could be effectively enforced. Section 706(f)(4) requires that an individual judge be desig-

nated immediately to hear and determine Title VII claims. Section 706(f)(5) requires that the designated judge assign the case for hearing at the earliest possible date and cause it to be in every way expedited. If the case is not scheduled for trial within 120 days after issue has been joined, the judge may appoint a master "pursuant to Rule 53 of the Federal Rules of Civil Procedure." Section 706(f)(2) provides that injunctive relief "shall be issued in accordance with Rule 65 of the Federal Rules of Civil Procedure." The Federal Rules of Civil Procedure are not applicable in state court proceedings. Similarly, the other procedural devices in § 706 may have no analog in the state courts.

Taken together these provisions exhibit a delicately balanced remedial scheme. State court adjudication of Title VII claims would disrupt this scheme and thus be incompatible with the federal interests.

ARGUMENT

I. Federal Courts Have Exclusive Jurisdiction Over Claims Arising Under Title VII Of The Civil Rights Act of 1964, as Amended, 42 U.S.C. § 2000e *Et Seq.*

A. The presumption of concurrent jurisdiction can be rebutted by an explicit statutory directive, by unmistakable implication from legislative history, or by a clear incompatibility between state-court jurisdiction and federal interests.

Even before the Constitution was adopted the framers understood that Congress would have the option of vesting jurisdiction over federal statutory claims exclusively in the federal courts or conferring jurisdiction concurrently on the state and federal courts. *See* The Federalist No. 82 (A. Hamilton). Hamilton's views were first addressed in *Claflin v. Houseman*, 93 U.S. 130 (1876), where this Court

established a three part test to determine if jurisdiction under a particular federal statute is exclusively federal. The first inquiry is whether Congress expressly conferred exclusive jurisdiction on the federal courts. If not, the Court must decide if Congress conferred exclusive jurisdiction by implication, or if concurrent jurisdiction would be incompatible with the federal interests served by the underlying statute. *Id.* at 136-137.

Over the years the *Claflin* test was applied in a series of cases. In *Second Employers' Liability Cases*, 223 U.S. 1 (1912) and *Missouri ex rel. St. Louis, Brownsville & Mexico Ry. v. Taylor*, 266 U.S. 200 (1924), the Court found concurrent state-court jurisdiction over claims which involved federal statutes that were based essentially on common law negligence principles that were familiar to the state courts. In neither case was there evidence of any congressional intent to make federal jurisdiction exclusive. Nor was any incompatibility identified between state-court jurisdiction and the purposes of the federal statutes.

More recently this Court invoked the *Claflin* test in *Charles Dowd Box Co. v. Courtney*, 368 U.S. 502 (1962), a case alleging breach of a collective bargaining agreement, arising under § 301(a) of the Labor Management Relations Act of 1947, 29 U.S.C. § 185(a). The Court concluded that state courts had traditionally been open to breach of contract actions such as those contemplated by section 301(a), but that Congress had intended to expand the forums in which claims for breach of collective bargaining agreements could be brought by making those claims cognizable in the federal courts. *Id.* at 508-09. Moreover, the Court found explicit evidence that Congress expressly intended not to encroach on the jurisdiction of the state courts. 368 U.S. at 512.

This Court's most recent application of the *Claflin* principle was *Gulf Offshore Co. v. Mobil Oil Corp.*, 453 U.S. 473 (1981). Reaffirming the basic approach to the question of exclusive jurisdiction set forth in *Claflin* and *Dowd*, the Court described the analytical framework as follows:

> In considering the propriety of state-court jurisdiction over any particular federal claim, the Court begins with the presumption that state courts enjoy concurrent jurisdiction. Congress, however, may confine jurisdiction to the federal courts either explicitly or implicitly. Thus, the presumption of concurrent jurisdiction can be rebutted by an explicit statutory directive, by unmistakable implication from legislative history, or by a clear incompatibility between state-court jurisdiction and federal interests.

Id. at 478 (citations omitted).

Gulf Offshore arose out of a personal injury claim filed by a worker on an oil-drilling platform off the coast of Louisiana who sustained injuries while being evacuated from the area during a storm. Under the Outer Continental Shelf Lands Acts, 43 U.S.C. § 1331 *et seq.* ("OCSLA"), Congress declared the outer continental shelf to be "an area of exclusive federal jurisdiction." Thus, all law applicable to the outer continental shelf was federal law. However, OCSLA borrowed the "applicable and not inconsistent" laws of the adjacent states as surrogate federal law to fill the substantial "gaps" in the Act's coverage. 453 U.S. at 480 (quoting 43 U.S.C. § 1333(a) (1) and (2)).

Under OCSLA, the personal injury law of Louisiana was made applicable to the claim. At issue was whether state courts had jurisdiction over OCSLA actions that were governed by such "borrowed" state law. The Court expressly declined to decide if federal courts would have

exclusive jurisdiction over suits involving other provisions of OCSLA. 453 U.S. at 480 n.7.

In examining the legislative history, the Court found only one comment which made reference to OCSLA conferring exclusive jurisdiction to the federal courts. Senator Long, an opponent of the bill, expressed a fear that OCSLA would place exclusive jurisdiction over all civil suits in federal district courts. 453 U.S. at 483 n.10. The Court refused to rely on this single statement as an implication of exclusive federal jurisdiction because "[t]he fears and doubts of the opposition are no authoritative guide to the construction of legislation." 453 U.S. at 483, *quoting Schwegmann Bros. v. Calvert Corp.*, 341 U.S. 384, 394 (1951).

Turning to the incompatibility standard, the Court first held that exclusive political jurisdiction did not necessarily imply exclusive judicial jurisdiction. 453 U.S. at 480-82. After finding that the operation of OCSLA would not be frustrated by state-court jurisdiction over personal injury actions, the Court reasoned as follows:

> The factors generally recommending exclusive federal-court jurisdiction over an area of federal law include the desirability of uniform interpretation, the expertise of federal judges in federal law, and the assumed greater hospitality of federal courts to peculiarly federal claims.

453 U.S. at 483-84. (footnotes omitted). The Court held that these three factors did not support exclusive federal jurisdiction over claims whose governing rules were borrowed from state law. First, there was no need for any uniform interpretation of laws that vary from one state to another. Second, state judges have greater expertise in applying their own laws. Third, state judges cannot be presumed unsympathetic to a claim governed by state rules for decision merely because it is labeled federal.

After examining all of these factors the Court concluded that "nothing in the language, structure, legislative history, or underlying policies of OCSLA suggests that Congress intended federal courts to exercise exclusive jurisdiction over personal injury actions arising under OCSLA." 453 U.S. at 484.

While *Dowd* and *Gulf Offshore* reaffirmed the validity of the *Claflin* test and explained its contours, there have been other cases in which this Court has, without reference to *Claflin*, held federal-court jurisdiction to be exclusive. *See General Investment Co. v. Lake Shore & Michigan Southern Ry. Co.*, 260 U.S. 261, 287-288 (1922) (claims under the Sherman Anti-trust Act and the Clayton Act may not be brought in state court); *Freeman v. Bee Machine Co.*, 319 U.S. 448, 451 n.6 (1943) (same); *Marrese v. American Academy of Orthopedic Surgeons*, 470 U.S. 373, 380-381 (1985) (same); *Garner v. Teamsters Local No. 776*, 346 U.S. 485, 491 (1953) (State courts may not enjoin conduct prohibited by the National Labor Relations Act).

Despite the Court's omission of any reference to *Claflin*, these cases all appear to be consistent with the principles articulated there. *Claflin*, *Dowd*, and *Gulf Offshore* establish that in the absence of an express congressional directive of exclusive federal-court jurisdiction, the Court must examine such factors as the language, structure, legislative history and underlying policies of the particular statute to determine whether Congress intended to confer exclusive jurisdiction in the federal courts. If such an intent is revealed by unmistakable implication from the legislative history or by a clear incompatibility between state-court jurisdiction and federal interests, then federal jurisdiction over the claim is exclusive.

As applied to Title VII of the Civil Rights Act, such an examination reveals an unmistakable implication arising

from the legislative history that Congress intended jurisdiction over Title VII actions to be exclusively federal. Moreover, the clear incompatibility between the procedures set forth in Title VII and state-court jurisdiction reveals that the federal interest would be compromised by a finding of concurrent jurisdiction. Each of these factors compels the conclusion that Title VII actions are within the exclusive jurisdiction of the federal courts.

B. Title VII's legislative history shows unmistakably that Congress intended that claims be brought exclusively in the federal courts.

The current language authorizing suits under Title VII is contained in § 706 of the Act, 42 U.S.C. § 2000e-5. This language was the subject of extensive congressional deliberation and compromise both when the Act was originally adopted in 1964, and when it was amended in 1972. Throughout that time, both congressional proponents as well as opponents of the legislation evidenced a clear understanding that the statute called for claims to be adjudicated solely in the federal courts.

1. As originally adopted the Civil Rights Act of 1964 unmistakably demonstrated that Congress intended that claims be brought solely in the federal courts.

Congress considered four different enforcement mechanisms for the proposed Civil Rights Act of 1964. The first two of these enforcement mechanisms would have created an administrative body similar to the National Labor Relations Board whose orders would be enforced in the federal courts of appeals. The latter two proposals called for enforcement actions in the federal district courts.

The first bill to receive significant consideration was H.R. 10144. Many of the provisions of this bill eventually

found their way into the Civil Rights Act of 1964. H.R. 10144 made it unlawful to discriminate on the basis of race, religion, color, national origin, ancestry or age. The law was to be administered by a five-member Equal Opportunity Commission with authority to use three approaches to gain compliance:

(1) Educational efforts;

(2) Investigation, conciliation and mediation; and

(3) Recourse to civil action in the Federal Courts in the event that the first two approaches fail.

H.R. Rep. 1370, 87th Cong., 2d Sess., 1964 Leg. Hist. at 2160. In the event that the Commission failed or declined to bring an enforcement action, the aggrieved individual was authorized to bring the action if one member of the Commission gave permission for him to do so. *Id.* at 2167.

The most important of the House bills was the Kennedy Administration's omnibus civil rights bill, H.R. 7152, which substituted a de novo court proceeding initiated by the Commission for the administrative type of cease-and-desist authority. As explained by Senator Clark, the Floor Manager of Title VII, it authorized the Equal Employment Opportunity Commission to initiate "an action in the U.S. district court to enjoin the unlawful conduct." If the Commission voted not to proceed, the bill provided that "the charging party may bring a private action in the U.S. district court" with the consent of one member of the Commission. *Id.* at 3070.

In the Senate, the Labor Committee approved Senator Humphrey's bill, S. 1937. Under it, enforcement of the statute was to be handled by an Administrator in the Department of Labor who was authorized to prosecute complaints before an independent Equal Employment Opportunity Board which was authorized to issue cease-and-desist orders which were enforceable in the federal courts of appeals.

At the same time that it was considering S. 1937, the Senate also had H.R. 7152 before it. H.R. 7152 was debated for 83 days and was amended 87 times on the Senate floor. One of the main concerns of the debate was the bill's enforcement mechanism. During this extended debate, a compromise substitute provision was negotiated which was eventually to become § 706 of the Act. As presented to the Senate on June 4, 1964, by Senator Humphrey, it stripped the EEOC of authority to bring enforcement actions, and authorized individuals to bring suit without approval from any of the commissioners. As Senator Humphrey explained:

> The Amendments of our substitute leave the investigation and conciliation functions of the Commission substantially intact. However, if the Commission has not been able to achieve voluntary compliance within 30 days . . . The Commission must so notify the person aggrieved, who then may within 30 days *bring his own suits in federal court* for enforcement of his rights.

Id. at 3003-3004 (emphasis added). The so-called Dirksen-Mansfield substitute amendment was adopted by the Senate on June 17, and the Civil Rights Act was adopted by the House and signed by President Johnson on July 2, 1964.

Of the four separate enforcement schemes considered by the 88th Congress, two would have created an enforcement body similar to the National Labor Relations Board. Had either of these bills been adopted, there would be no question but that state courts would lack adjudicatory authority over Title VII claims.[1]

1. Congress is presumed to know of a judicial interpretation of a prior law when it enacts a new statute with similar language. *See* Lorillard v. Pons, 434 U.S. 575, 580-81 (1978). At the time Congress was considering the cease-and-desist models in S. 1937 and H.R. 405 for

(Footnote Continued)

The other two enforcement schemes called for vindication of Title VII rights through court action, either by the Commission or by the aggrieved individual. If either of these alternatives were thought to contemplate actions in state courts, one would expect some mention of this in the legislative debate. However, there is not a single reference in the legislative history to the possibility that the new federal rights would be enforced in the state courts.

Both the supporters and opponents of the court enforcement mechanism understood that enforcement was to be in the federal courts.[2] Representative McCullouch a leading proponent of the court enforcement mechanism summed up the common understanding:

> As the Title was originally worded, the Commission would have had authority to not only conduct investigations, but also institute hearing procedures and issue orders of a cease-and-desist nature. A substantial number of committee members, however, *preferred that the ultimate determination of discrimination rest with the Federal judiciary.* Through this requirement, we believe the settlement of complaints will occur more rapidly and with greater frequency.

H.R. Rep. 914, 88th Cong. 1st Sess., reproduced in 1964 Leg. Hist. at 2150 (Separate views of Rep. McCullouch) (emphasis added).

Footnote Continued—
inclusion in the Civil Rights Act of 1964, the Court had held that a similar enforcement model enacted in the National Labor Relations Act ousted state courts of adjudicatory authority. Garner v. Teamsters Local 776, 346 U.S. 485, 491 (1953).

2. *See, e.g.*, H.R. Rep. 914, 88th Cong., 1st Sess., reproduced in 1964 Leg. Hist. *Id.* at 2108 (minority views of Reps. Poff & Cramer on H.R. 7152) ("[T]he Commission is required to bring a civil suit in the Federal District Court against the employer."); *Id.* at 3283 (remarks of Rep. Celler, 1/31/64) ("[T]he Commission could seek redress in the federal courts."); *Id.* at 3258 (remarks of Rep. Ryan, 2/1/64) ("[T]he Commission may seek relief in the Federal district court where the judge will hear the matter de novo."); *Id.* at 3279 (remarks of Rep. O'Hara, 2/8/64) ("[T]he Commission could then file suit in the district court."); *Id.* at 3117 (remarks of Sen. Carlson, 5/11/64) ("Should voluntary efforts fail the Commission could bring suit in the Federal courts.") (emphasis added). *See also* H.R. Rep. 1370, 87th Cong., 2d Sess., which formed the basis for H.R. 7152. *Compare* 1964 Leg. Hist. at 2160 ("[C]ivil action in the Federal Couts [sic]"), and *Id.* at 2175 ("[I]nitial trial should be before a U.S. District court.") *with Id.* at 2167 (description of right to bring a civil action).

Congress referred only to suits in the federal courts in discussing both the right of the Commission to bring suit and the right of an individual to do so. The unmistakable implication of these comments is that Congress understood that, under either court enforcement alternative, findings of employment discrimination would be made only by federal court judges. The same was true with regard to the Dirksen-Mansfield substitute.[3] As Senator Cotton stated, "[T]he process will lead to one place—the door of the Federal Court." *Id.* at 3308.

The decision of the court below overlooks the relevant legislative history of Title VII. Instead, the opinion cites only legislative history indicating that Title VII was never intended to be the exclusive remedy for employment discrimination. (A-8). The mere fact that the federal remedy created by Title VII was to be in addition to whatever remedies the several states might provide does not suggest that the federal remedy was not to be enforced exclusively in the federal courts. There is a vast distinc-

3. *Id.* at 3010 (remarks of Sen. Clark 4/8/64) (EEOC charged with the duty to bring "suits in the Federal courts."); *Id.* at 3286 (memorandum of Sen. Case, 4/8/64) ("Commission may seek relief in a Federal district court . . . ."); *Id.* at 3044 (remarks of Sen. Clark 6/6/64) ("[T]he party allegedly discriminated against may, with the written permission of one member of the Commission bring his own suit in Federal court."); *Id.* at 3031 (remarks of Rep. Celler, 7/2/64) ("[T]he aggrieved party . . . may file an action in the Federal district court in which the practice has occurred."); *Id.* at 3026-3027 (Comparative analysis of House and Senate versions).

tion between creating an exclusive federal remedy and creating a supplementary remedy which can only be enforced in the federal courts. *Compare California v. Arc America Corp.*, ___ U.S. ___, 57 U.S.L.W. 4425, 4427 (April 18, 1989) *with Marrese v. American Academy of Orthopedic Surgeons*, 470 U.S. 373, 379 (1985). The Seventh Circuit's conclusion that non-exclusive jurisdiction follows from a non-exclusive remedy is therefore not correct.

Even the scant legislative history cited by the court below omits language showing that Congress understood that Title VII suits would be brought in the federal courts. The Interpretive Memorandum of Senators Clark and Case, cited by the Seventh Circuit at A-8, includes the following:

> [O]rdinarily a suit will be brought in a Federal district court . . . [except that] the Commission may decide not to bring suit in a given case. . . . If the Commission decides not to sue, . . . the party allegedly discriminated against may . . . bring his own suit in Federal court. . . . The suit against the respondent, whether brought by the Commission or by the complaining party, would proceed in the usual manner for litigation in the Federal Courts.

1964 Leg. Hist. at 3044. Although the Clark-Case Interpretive Memorandum referred to H.R. 7152 prior to presentation of the Dirksen-Mansfield Substitute Amendment, it offers clear insight into Congress' understanding of both forms of court enforcement. Regardless of whether suits were brought by the Commission or by aggrieved individuals, Congress understood that actions would be handled in the same forum—the federal district courts—and that they would proceed in the unusual manner for such litigation.

2. Judicial Interpretations of the 1964 Act support a finding of exclusive federal jurisdiction.

Between the effective date of Title VII and the 1972 amendments to the Act, the question of jurisdiction to enforce the statute was decided in two cases. *Hutchings v. United States Industries, Inc.*, 428 F.2d 303 (5th Cir. 1970); and *Bowers v. Woodward & Lothrop*, 280 A.2d 772 (D.C. Ct. App. 1971). Both of these courts concluded that federal courts had exclusive jurisdiction to hear claims arising under the Civil Rights Act of 1964.

In *Hutchings*, the court stated:

> To the federal courts alone is assigned power to enforce compliance with section 703(a), and the burden of obtaining enforcement rests upon the individual claiming to be aggrieved by its violation. Pettway v. American Cast Iron Pipe Co., 5 Cir. 1969, 411 F.2d 998, 1005.

428 F.2d at 310. The court went on to observe that "Congress, however, has made the federal judiciary, not the EEOC or the private arbitrator, the final arbiter of an individual's Title VII grievance." *Id.* at 313-14.

In *Woodward & Lothrop*, the Court of Appeals held:

> Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e-5(a) and (f) specifically grants jurisdiction to remedy violations of the Civil Rights Act to the Equal Employment Opportunity Commission at the administrative level, and to the United States District Courts at the judicial level. Accordingly, the court below, lacking jurisdiction on this aspect of the case, correctly ruled that appellant's allegation of Civil Rights Act violations was not before it.

280 A.2d at 774.

To Petitioner's knowledge, these are the only two cases prior to the 1972 amendments to address specifically

whether federal courts have exclusive jurisdiction over claims arising under Title VII. The holdings of these two decisions reflect the common understanding when Congress amended the statute in 1972.

3. The Equal Employment Opportunity Act of 1972 continued the policy of exclusive federal jurisdiction over Title VII claims.

Claflin, Dowd and *Gulf Offshore* impose a duty to examine the legislative history of a statute to determine if federal jurisdiction is intended to be exclusive; however, the court below noticeably avoided any detailed examination of the legislative history of the Equal Employment Opportunity Act of 1972. The 1972 amendments to the Civil Rights Act of 1964 radically restructured aspects of Title VII, including the provisions at issue in this case. A review of that legislative history demonstrates an unmistakable desire by Congress to retain all Title VII actions within the exclusive jurisdiction of the federal courts.

On June 2, 1971, the House Education and Labor Committee reported H.R. 1746, the basic purpose of which was to grant the EEOC authority to issue enforceable cease-and-desist orders and "to seek enforcement of its orders in the Federal Courts." H.R. Rep. 92-238, 92d Cong. 1st Sess., at 1 and 9, 1972 Leg. Hist. at 61 and 69. H.R. 1746 would have retained the right of an individual to bring a civil suit under the Act after the individual's claim had first been presented to the EEOC.

> Section 715 provides that if the Commission finds no reasonable cause, fails to make a finding of reasonable cause, or takes no action in respect to a charge, or has not within 180 days issued a complaint nor entered into a conciliation or settlement agreement which is acceptable to the person aggrieved, it shall notify the person aggrieved. Within 60 days after such notification the person aggrieved shall then have the right to commence an action under the provisions of the Act against the respondent in the proper United States District Court. Provision for the individual's right to sue is presently contained in Section 706(e) of Title VII. Section 715 in the bill retains this right and extends both the period of Commission action and the time period allowing for filing an action in the appropriate court.

Id. at 11-12, 1972 Leg. Hist. at 71-72. The Committee's report is instructive because it reveals that the proponents of H.R. 1746 understood that their bill was retaining the right of individuals to sue "in the proper United States District Court."

When the House debated H.R. 1746, Representative Erlenborn offered a substitute amendment authorizing the EEOC to bring suits in the federal district courts. The debate on the Erlenborn Amendment focused on whether to grant the Commission the power to file suit or the power to issue cease-and-desist orders. The language of the Erlenborn amendment provided that if the Commission had not obtained voluntary compliance with the Act within thirty days, "the Commission may bring a civil action against the respondent named in the charge . . . ." If the Commission failed to obtain voluntary compliance or institute a civil action within 180 days, "a civil action may be brought against the respondent named in the charge . . . by the person claiming to be aggrieved . . . ." Thus, under the Erlenborn substitute, the right to bring a civil action was cast in nearly identical language without regard to whether the party was the EEOC or a private individual. It was understood to apply to all federal job discrimination cases. *Id.* at 303 (remarks of Rep. Robison).

During debate on the Erlenborn substitute, neither the proponents nor the opponents of the amendment made any

reference to enforcement actions being brought in the state courts. Rather, the numerous speakers argued in favor of enforcement in the federal district courts as a better alternative to cease-and-desist authority.[4]

In describing his amendment, Representative Erlenborn attempted to distinguish the rules and procedures which would apply in a federal district court suit from those applicable to an administrative agency with cease-and-desist power.

> I would point out, however, that the rules of evidence, the rules of civil procedure that apply in the courts, the Federal district courts, *as my bill would require any case to be tried there,* those general rules of evidence do not necessarily apply in an administrative hearing.

Id. at 219 (emphasis added). Representative Erlenborn understood that his bill would *require* any case to be tried in the federal courts. This clear and unequivocal statement is far more than an "implication from the legislative history." Similarly, other representatives understood that the Erlenborn substitute would require all enforcement actions to be brought in federal court.[5]

The debate over H.R. 1746 also focused on the proliferation of suits which could be expected by the expanded

4. *Id.* at 193 (remarks of Rep. Martin) ("[T]he matters would be handled in the Federal courts, which is the proper place to handle cases of this nature, rather than in a Commission."); *Id.* at 194 (remarks of Rep. Perkins) (referring to the existing law under Title VII: "Such enforcement as an individual might require had to be secured by private suit in the district courts."); *Id.* at 221 (remarks of Rep. Railsback) ("I would like to add my support to the Erlenborn substitute bill . . . which in effect would empower the Equal Employment Opportunity Commission to take its cases to the Federal Courts."); *Id.* at 275 (remarks of Rep. Abzug) ("[A]n administrative order can be obtained within several months, while the median time for resolving a case in the U.S. district court is 19 months.").

5. *See, e.g., Id.* at 252 (remarks of Speaker Albert) ("The opponents also seek to justify their position by arguing that the administrative

(Footnote Continued)

coverage and other changes in the Civil Rights Act made by H.R. 1746. Representative Anderson, a proponent of the cease-and-desist approach, stated his reasons for supporting that approach as "the very deep-seated fear I have that if we are going to simply overburden the Federal judiciary with congressional grants of authority in these cases, we will thereby thwart what the proponents of this change say they want, and that is efficient and expeditious enforcement of the guarantees contained under Title VII of the bill." *Id.* at 216. He cited statistics on the backlog in various federal district courts, but made no reference to the possibility that any Title VII cases would ever be heard in state courts.

None of the representatives who addressed the concern over the potential overburdening of the federal courts under the Erlenborn substitute ever suggested that the state courts, which were much more numerous, could be utilized to relieve some of this burden. *Id.* at 242 (remarks of Rep. Eckhardt) ("[I]f you load this new field of law on the courts, you are calling upon Federal judges to decide the myriad of questions that arise before them . . . . [E]ither you will not be able to get to trial before a Federal Court in one of these discrimination cases or you will so heavily load the Federal court's docket that other lawyers will not be able to try their pressing cases.").

The House adopted the Erlenborn substitute on September 16, 1971 and sent H.R. 1746, as so amended, to the

Footnote Continued—
cease-and-desist process would be inherently unjust as administered by the EEOC, and that *the protection of the principles of justice requires that these cases be heard only in the Federal courts.*") (emphasis added); *Id.* at 261 (remarks of Rep. Gerald Ford) ("In the Erlenborn substitute there is a new device for enforcement. It is a different device from the cease-and-desist, but it is an effective one, because it requires legal action in a court of law, in the Federal courts."); *Id.* at 277 (remarks of Rep. McCullouch) ("[The Erlenborn substitute] would allow only a Federal court to issue such an injunction.")

Senate for consideration. The main Senate bill was S. 2515, introduced by Senator Williams. It expanded coverage of Title VII to include educational institutions, state and local government employers and the federal government as an employer. The remedial provisions of the bill called for the EEOC to have cease-and-desist power, with its orders subject to review in the federal courts of appeals. A private right of action was retained in the proposed § 706(q) on the same terms as contained in the original House version of H.R. 1746. Federal employees were also guaranteed the right to file civil actions as provided in § 706(q), in which the head of the department, agency or unit, as appropriate, was to be the named defendant.

Senator Dominick led the opposition to the cease-and-desist enforcement scheme proposed in the Williams bill. He offered an amendment (No. 611) to substitute a civil action by the Commission or the aggrieved individual. Senator Javits protested over the effect that this amendment would have on the federal court backlog. In so doing he confirmed the common understanding that the Dominick amendment would require that all Title VII suits be filed in the federal district courts:

> The fourth point is that the backlog in the courts is extremely heavy. *In the district courts, where under the Dominick amendment suits would have to be filed,* it is the heaviest, being around a 20-month period in the major industrial states where most of these cases would be carried on.

Id. at 905 (emphasis added).

Senator Dominick stated his desire to see that the rights of both sides were fully protected. He cited both the impartial nature of the federal court system and the expertise of the federal district courts as important safeguards to protect the constitutional rights of all participants. *Id.* at 907 and 911. The Dominick amendment was initially defeated on January 26, 1972. However, it was later revised and eventually adopted by the Senate.

The next attempt to eliminate the cease-and-desist provisions of S. 2515 was an amendment offered by Senators Allen and Ervin, two opponents of the legislation. Their amendment would have substituted the bill passed by the House, H.R. 1746 (the Erlenborn substitute), for the Williams bill. Although this amendment was defeated by the Senate, statements by both Senators Allen and Ervin evidenced that they shared Representative Erlenborn's understanding that the House Bill required all Title VII cases to be tried in the federal courts.[6] No Senator ever indicated any contrary understanding.

On October 21, 1971, the Senate Committee on Labor and Public Welfare submitted a report to accompany S.

---

6. *Id.* at 975 (remarks of Sen. Ervin) ("As I understand it, one of the fundamental principles of the substitute offered by the Senator from Alabama on behalf of himself and myself is to make certain that, instead of having the judicial function exercised by members of the Commission who have preferred the charges or whose associates have preferred the charges, the validity should be determined by the district courts of the United States as in all other civil actions."); *Id.* at 976 (remarks of Sen. Allen) ("So it would not be an unfriendly tribunal by which those charges or complaints would be heard. They would be heard by the Federal District Courts." "It would be a Federal district court of the place where the alleged unfair employment practice took place. . . . So the strong sentiment of just about an equal number of Senators is that the forum for settling and determining the rights of citizens shall be the Federal judiciary, starting at the courts closest home."); *Id.* at 836 (remarks of Sen. Allen) ("They [the EEOC] need to get rid of some of the backlog they have or, under the provisions of the House bill which we are seeking to substitute, have these matters decided in the Federal district court."); *Id.* at 836 (remarks of Sen. Allen) ("Let it [the EEOC] perform those two functions. Let it receive complaints, and let it prosecute the complaints, but prosecute them in a Federal court, before one of the 398 Federal district judges."); *Id.* at 989 (remarks of Sen. Ervin) ("As I construe Title VII of the Civil Rights Act of 1964, the aggrieved party . . . would have to bring the action in the district court in his own behalf to obtain a remedy for the discrimination.")

2515. S. Rep. 92-415, reprinted in 1972 Leg. Hist. at 410. This report noted that the bill would give federal workers "the full rights available in the courts as are granted to individuals in the private sector under Title VII." *Id.* at 16, 1972 Leg. Hist. at 425. No mention was made of any option to file suit in state court. Instead, the Committee expressly stated that the opportunity being given to "the aggrieved Federal employee . . . [was] to file an action in the appropriate U.S. district court . . . . It is intended that the employee have the option to go to the appropriate district court or the District Court for the District of Columbia . . . ." *Id.*

We cannot presume Congress intended to subject the personnel actions of federal department heads to review by state court judges. *See Tarble's Case,* 80 U.S. (13 Wall.) 397 (1871). By stating that these employees would enjoy the full rights available in the courts as are granted to individuals in the private sector under Title VII, the Committee evidenced its understanding that private sector claims could be brought only in federal courts.

Attaching his individual views to the Committee Report, Senator Dominick took issue with those who favored the cease-and-desist approach to resolving discrimination claims:

> This judgment is best afforded by Federal Court judges who, shielded from political influence by life tenure, are more likely to withstand political pressures and render their decisions in a climate tempered by judicial reflection and supported by historical judicial independence.

Id. at 85-86, 1972 Leg. Hist. at 493-94.

The Dominick amendment (No. 611) was again debated by the Senate in November of 1971. Again it was defeated, this time by a 41-43 vote; and again the legislative

debate left no doubt that the proposal called for exclusive jurisdiction over Title VII claims in the federal courts. In presenting his amendment to the Senate, Senator Dominick explained its purpose:

> Mr. President, what this amendment would do is to guarantee the protection of both parties' rights through fair, effective, and expeditious Federal Court machinery. It would avoid the vicissitudes of presidentially appointed boards and *vest adjudicatory power where it belongs—in impartial judges shielded from political winds by life tenure.*

1972 Leg. Hist. at 549 (emphasis added). Not all state court judges are protected by life tenure. Thus, the protection sought by the Dominick amendment excluded state tribunals by definition.

Other members of the Senate similarly articulated their understanding that the Dominick amendment would limit the adjudication of Title VII claims to the federal courts. As Senator Baker, a co-sponsor of Amendment No. 611, stated:

> [The] fundamental decision is whether enforcement powers should be vested in the EEOC itself or in the Federal courts. I for one, believe strongly that such authority should be left to the judiciary.

Id. at 559.[7]

7. *Id.* at 667 (remarks of Sen. Schweiker) ("The Senator's amendment would substitute for our EEOC hearing procedures, trials in a district court."); *Id.* at 688 (remarks of Sen. Gambrell) ("I have confidence in the Federal judicial system to implement a consistent and manageable job discrimination act."); *Id.* at 699 (remarks of Senator Fannin) ("And adjudication by the federal courts will provide the consistency and continuity which is a vital element of our judicial process."); *Id.* at 699 (remarks of Senator Allen) ("That is something we want to avoid by requiring the EEOC not to be prosecutor, judge, and jury, but to substitute Federal district courts for the judicial aspects of the Commission as provided for by the bill. The Dominick amendment would accomplish this result.")

With the narrow defeat of the Dominick amendment Senator Williams sought to temper criticism of his bill by watering down the enforcement language to provide for abbreviated proceedings in the federal district courts following a hearing held before the EEOC. *Id.* at 1355. While this amendment was pending, Senator Dominick introduced another amendment (No. 884) to provide for direct court enforcement. The new Dominick amendment contained similar language to the prior amendment (No. 611) concerning the right of the EEOC or an aggrieved individual to commence a civil action for violation of the statute.

The debate on the revised Dominick amendment again reflected a congressional understanding that the jurisdiction of the federal courts over Title VII actions would be exclusive.[8]

Following limited debate, the Senate voted to approve the Dominick amendment, and moved quickly to pass the bill and resolve its differences with the House version. Because both the Senate and House bills provided for court enforcement of claims under Title VII, the conference

8. *See Id.* at 1527 (remarks of Sen. Dominick) ("The point is however, that every governmental agency and every employee of a governmental agency, State, local or Federal, has his rights in the Federal courts."); *Id.* at 1533 (remarks of Sen. Cooper) ("I support the amendment because, fundamentally, I believe that the district courts, with the competence to hear the evidence at firsthand is much fairer than the cease-and-desist procedure . . . ."); *Id.* at 1534 (remarks of Sen. Taft) ("The real issue is whether small businessmen will have to defend charges before an agency or go to the expense of hiring big city lawyers to defend them in U.S. district courts. In my judgment the small businessmen of this country are going to find themselves in very costly, lengthy, and difficult situations if they are hauled into U.S. district court to answer every charge."); *Id.* at 1534 (remarks of Sen. Allen) ("[T]he charges would have to be filed with the various Federal district courts throughout the country where the alleged unfair employment practices took place."); *Id.* at 1534 (remarks of Sen. Dominick) ("In this particular type of situation, we would be distributing the power to enforce this law to 93 district courts with 398 district judges.").

report did not address the issue of whether federal courts would have exclusive jurisdiction over Title VII claims in any depth. The report simply noted that "Both the House bill and the Senate amendment authorized the bringing of civil actions in Federal district courts in cases involving unlawful employment practices." S. Rep. 92-681, 92d Cong. 2d Sess. at 17, 1972 Leg. Hist. at 1815. In light of the statute's mere reference to the right to bring a civil action, the Committee Report's reference is a clear indication that the conferees understood through the long debates on the court enforcement provision that Congress intended that all claims under Title VII be brought only in the federal courts.

4. Judicial and administrative interpretations of Title VII, after the statute was amended in 1972, support a finding of exclusive federal jurisdiction.

In *Kremer v. Chemical Construction Corp.*, 456 U.S. 461, 479 n.20 (1982), this Court noted that it had not decided whether claims arising under Title VII were vested within the exclusive jurisdiction of the federal courts. Several of this Court's earlier decisions, however, suggest that the federal courts have exclusive jurisdiction over Title VII actions. In *Lehman v. Nakshian*, 453 U.S. 156 (1981), the Court concluded that Congress limited jurisdiction to the federal district courts for age discrimination claims brought by employees of the federal government. The Court stated that "exclusive district court jurisdiction is also consistent with the jurisdictional references in Title VII of the Civil Rights Act of 1964. *See* 42 U.S.C. §§ 2000e-5(f)(3) and 2000e-16(e)."

The reference to 42 U.S.C. § 2000e-5(f)(3) refers to the provision of Title VII granting jurisdiction to the United States district courts for actions brought under Title VII.

The provisions of 42 U.S.C. § 2000e-16(e) are applicable to federal employees, and provide that nothing contained in Title VII shall relieve any government agency or official of the responsibility to assure nondiscrimination in employment. This discussion in *Nakshian* suggests the appropriateness of finding exclusive federal jurisdiction in this case. *See also Kremer*, 456 U.S. at 468 ("The federal courts were entrusted with ultimate enforcement responsibility under Title VII."); *New York Gaslight Club, Inc. v. Carey*, 447 U.S. 54, 64 (1980) ("Of course, the 'ultimate authority' to secure compliance with Title VII resides in the federal courts."); *Alexander v. Gardner-Denver Co.*, 415 U.S. 35, 46 (1974) ("Federal courts have been assigned plenary power to secure compliance with Title VII.").

Previously, the Courts of Appeals that have considered the jurisdictional aspects of Title VII have consistently held that jurisdiction over Title VII claims is lodged exclusively in the federal courts. *Bradshaw v. General Motors Corp.*, 805 F.2d 110, 112 (3d Cir. 1986); *Hutchings v. United States Industries, Inc.*, 428 U.S. 303 (5th Cir. 1970); *Dyer v. Greif Bros., Inc.*, 755 F.2d 1391, 1393 (9th Cir. 1985); *Valenzuela v. Kraft, Inc.*, 739 F.2d 434 (9th Cir. 1984); *Jones v. Intermountain Power Project*, 794 F.2d 546, 553 (10th Cir. 1986); *Long v. State of Florida*, 805 F.2d 1542, 1546 (11th Cir. 1986), *cert. denied*, ___ U.S. ___, 108 S.Ct. 78, 98 L.Ed.2d 41 (1988). Thus, the Seventh Circuit is the only Circuit Court to conclude that State courts have concurrent jurisdiction over Title VII claims.[9]

9. Several district courts have also ruled upon this question. *Compare* Greene v. County School Board, 524 F. Supp. 43 (E.D. Va. 1981) (holding jurisdiction concurrent); and Bennun v. Board of Governors, 413 F. Supp. 1274 (D. N.J. 1976) (same); *with* Varela v. Morton/Southwest Co., 681 F. Supp. 398, 400 (W.D. Tex. 1988) (holding that federal courts have exclusive jurisdiction over Title VII claims); Glezos v. Amalfi Ristorante Italiano, Inc., 651 F. Supp. 1271, 1277 (D. Md. 1987) (same); and Dickinson v. Chrysler Corp., 456 F. Supp. 43 (E.D. Mich. 1978) (same).

Among the state courts to consider this question, the vast majority have held that federal courts possess exclusive jurisdiction over Title VII claims.[10] When federal interests require it, Congress can require the states to offer a forum to adjudicate Title VII claims. *Testa v. Katt*, 330 U.S. 386 (1947). In the absence of a strong federal interest, respect for the principles of federalism should make this Court reluctant to construe Title VII in such a manner as to force the states to hear claims against their will.

The EEOC is also of the view that federal courts have exclusive jurisdiction over Title VII claims. *See* amicus brief for the United States and the EEOC in *Minnick v. California Dept. of Corrections*, 452 U.S. 105 (1981), and briefs filed by the Commission in *Pirella v. Village of North Aurora*, app. pending 7th Cir. No. 89-1231 and *McNasby v. Crown Cork & Seal Co.*, 3d Cir. No. 88-1893, app. pending. As the agency charged with administrative enforcement of Title VII, the Commission's views have been treated with respect and deference by this Court. *See, e.g., EEOC v. Commercial Office Products, Inc.*, 486 U.S. 100 (1988).

In sum, the vast majority of authorities that have addressed the issue have concluded that Title VII jurisdic-

10. *Compare* Bunson v. Wall, 405 Mass. 446, 541 N.E.2d 338 (1989); Fox v. Eaton Corp., 48 Ohio St. 2d 236, 237, 358 N.E.2d 536 (1976); Sweeney v. Hartz Mountain Corp., 78 Md. App. 79, 552 A.2d 912 (1989); Flournoy v. Akridge, 189 Ga. App. 351, 352, 375 S.E.2d 479 (1988); Scott v. Carter-Wallace, Inc., 137 Misc.2d 672, 52 N.Y.S.2d 614 (N.Y. Sup. Ct. 1987); Retired Public Employees' Association v. Board of Administration, 184 Cal.App.3d 378, 384-385, 229 Cal. Rptr. 69 (Cal.App. 3 Dist. 1986); Minor v. Michigan Education Association, 338 N.W.2d 913 (Mich. App. 1983); Long v. Department of Administration, 428 So.2d 688 (Fla. 1st D.C.A. 1983); Lucas v. Tanner Bros. Contracting Co., 10 FEP Cases 1104 (Ariz. Sup. Ct. 1974); and Bowers v. Woodward & Lothrop, 380 A.2d 772 (D.C. Ct. App. 1971) (all holding federal jurisdiction to be exclusive) *with* Lindas v. Cady, 150 Wis. 421, 441 N.W.2d 705 (1989); Jesson, Inc. v. Tedder, 481 So.2d 554 (Fla. 4th D.C.A. 1986); Peper v. Princeton, 77 N.J. 55, 389 A.2d 465 (1978); and Vason v. Carrano, 31 Conn. Sup. 338, 330 A.2d 98 (1974) (all holding jurisdiction to be concurrent).

tion rests exclusively in the federal courts. The conclusions of these authorities are consistent with the legislative history of Title VII and support a finding of exclusive federal jurisdiction by this Court.

C. **The purposes, structure and procedures of Title VII are clearly incompatible with concurrent state court jurisdiction over Title VII claims.**

1. **The structure of Title VII contains a delicately balanced remedial scheme which would be disrupted by permitting state courts to exercise concurrent jurisdiction over Title VII claims.**

As this Court has previously recognized, the legislative proceedings which produced Title VII were tempestuous. *Mohasco Corp. v. Silver,* 447 U.S. 807, 818 (1980). The remedial scheme resulting from the legislative maelstrom was clearly the result of compromise. As part of the compromise, Congress established an unusual structure under which individuals could not enforce their federal right to a federal forum until they had first exhausted available remedies at the state or local level for a limited period of time.

To obtain any employment practices bill, proponents of the legislation agreed to minimize federal interference with the states and to grant some measure of deference to the state efforts to eliminate racial discrimination. *See* remarks of Sen. Humphrey, 1964 Leg. Hist. at 3003. Under § 706(c) of the 1964 Act, the Commission was prohibited from taking any action on a discrimination complaint for at least 60 days in order to allow state or local officials an opportunity to remedy the alleged unlawful practice under the state or local law.

It would be anomalous to direct an aggrieved individual to a state or local agency for relief only to interrupt that process to allow the EEOC to attempt to conciliate the

claim before again authorizing the individual to return to a state forum. If Title VII claims could be asserted in state courts, there would be no reason to require aggrieved individuals to delay pursuit of their claims at the state level merely to allow the EEOC to attempt to conciliate the dispute.

The Seventh Circuit failed to see any incompatibility between the federal interests and State-court jurisdiction because the court viewed the Title VII deferral process as comparable to the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. § 626. Here the court was mistaken. Although the substantive rights under the ADEA were patterned on Title VII, the remedial provisions of the ADEA were based on the Fair Labor Standards Act, which expressly provides for concurrent jurisdiction. 29 U.S.C. § 626(c). While the ADEA requires that an aggrieved individual pursue a claim before an available state or local agency, this may be done concurrently with the prosecution of a federal claim. *Oscar Mayer & Co. v. Evans,* 441 U.S. 750 (1979).

In contrast, § 706 of Title VII provides a carefully ordered sequential procedure. *Mohasco Corp. v. Silver,* 447 U.S. at 821. The court below erroneously confused the remedial and procedural provisions of Title VII with those of the ADEA. As this Court noted in *Lorillard v. Pons,* 434 U.S. 515, 584 (1978), "[I]t is the remedial and procedural provisions of the two laws that are crucial, and there we find significant differences." The court below improperly blurred those distinctions.

The remedial scheme of Title VII also includes provisions for appeals. Section 706(j), 42 U.S.C. § 2000e-(5)(j), provides:

> Any civil action brought under this section and any proceedings brought under subsection (i) shall be sub-

ject to appeal as provided in sections 1291 and 1292, Title 28.

Sections 1291 and 1292 of Title 28 of the United States Code govern the appellate jurisdiction of the United States Courts of Appeals. The court below held that this provision was a mere grant of jurisdiction. (A-7). Such a reading of the statute is too narrow. First, it was not necessary for Congress to state expressly that appeals could be brought to the Court of Appeals. Second, §§ 1291 and 1292 carry interpretations as to what constitutes an appealable order, a concept that may differ from state to state. Third, the inclusion of specific language concerning appeals demonstrates that Title VII is incompatible with concurrent state court jurisdiction. Neither Section 1291 nor 1292 authorize the Courts of Appeals to review cases from State courts. As the Ninth Circuit held in *Valenzuela v. Kraft, Inc.*, 739 F.2d 434 (9th Cir. 1984):

> Congress could not have intended that actions brought in state court be appealed to the federal circuit courts. Thus section 706(j) unmistakably implies that Congress intended to vest exclusive jurisdiction in the federal courts.

Id. at 435.

2. The federal interest in promoting a uniform interpretation of Title VII supports a finding of exclusive federal jurisdiction over Title VII claims.

One of the factors generally recommending exclusive federal-court jurisdiction over an area of federal law is the desirability of uniform interpretation. *Gulf Offshore Co. v. Mobil Oil Corp.*, 453 U.S. at 483-84. A great diversity in the interpretation of a statute is likely to result when it is subject to interpretation by a large number of courts.

When state courts share adjudicatory power over a federal enactment, their incorrect interpretations are less likely to be corrected by this Court.

Congress was cognizant of the need for uniform interpretations of Title VII. Proponents of the cease-and-desist approach cited the need for uniformity of interpretation as reason for granting the EEOC cease-and-desist authority. *See e.g.*, 1972 Leg. Hist. at 196. Opponents of cease-and-desist authority did not challenge the need for uniformity. Rather, their concerns were that the determination be made by the federal district courts instead of an administrative body.

The court below found that the existence of a great body of Title VII law reduced the risk to uniformity that concurrent jurisdiction would engender. (A-9). The lower court's approach overlooks the fact that Title VII is constantly evolving. Its contours and definitions are subject to change and refinement as this Court and the federal courts of appeals render new decisions.

In addition, the uniformity of interpretation that is accomplished by exclusive federal jurisdiction will also promote the independence of state court development of state anti-discrimination laws. If state courts are found to have concurrent jurisdiction over Title VII claims, there is a substantial chance that the substantive federal law will subsume and overwhelm independent state law. In a situation of flourishing state experimentation in the development of anti-discrimination initiatives, it seems that the diversities and conflicts which are a beneficial aspect of our federal system are best promoted by leaving state courts free to focus on their own anti-discrimination laws.

3. The expertise and unique stature of federal judges in interpreting Title VII recommends a finding of exclusive federal jurisdiction over Title VII claims.

In *Gulf Offshore* this Court recognized that the expertise of federal judges in interpreting federal law is a significant factor recommending exclusive federal jurisdiction. 453 U.S. at 484. There can be no doubt that federal judges have developed an impressive expertise in applying Title VII law. The court below discounts that expertise because most states have enacted employment discrimination laws. That analysis is faulty because it is premised on the assumptions that employment discrimination claims are routinely litigated in state courts and that state court judges are quite familiar with discrimination issues. Those assumptions were incorrect when Title VII was adopted and remain incorrect today.

At the time Title VII was adopted, only about one-half of the states had any anti-discrimination laws. Experience indicated that very few cases brought under those state laws were ever litigated in a judicial forum. 1964 Leg. Hist. at 2155, 2160. Thus, at the relevant time, there was no reason to believe that state courts would be competent to handle Title VII claims.

Even today, the state courts are no more competent to handle Title VII claims than they were in 1964. The vast majority of states that have anti-discrimination laws have delegated enforcement to administrative agencies whose findings are subject to only limited appellate review.[11]

11. At the time of the 1972 amendments, 38 states had equal employment opportunity laws, of which 32 utilized the cease-and-desist method of enforcement. 1972 Leg. Hist. 202-03 (remarks of Rep. Hawkins). Since then several additional states have opted for a cease-and-desist enforcement mechanism. *See* Fla. Stat. § 760.10 (1983); Ga. Code Ann. § 45-19-38 (1981); La. Rev. Stat. Ann. § 2261 (West 1988); Mo. Rev. Stat. § 213.075.1 (1986); Mont. Code Ann. § 48-119 (1989); Nev. Rev. Stat. § 233.170 (1983); N.H. Rev. Stat. Ann. § 354-A:9 (1986); S.D. Codified Laws § 20-13-42 (1989); and Tenn. Code Ann. § 4-21-305 (1989).

Illinois courts, for example, never try race or sex discrimination cases, but merely review administrative agency findings under the "manifest weight of the evidence" standard. Ill. Rev. Stat., Ch. 68, § 8-11(A)(2). It would not further the purpose of Title VII to entrust its development to courts that are incompetent under state law to hear the kinds of cases that will arise under the federal statute.

Title VII litigation is both complex and subtle. *See* 1972 Leg. Hist. at 672 (remarks of Sen. Humphrey). Forcing state courts to handle Title VII claims when they do not hear similar claims under state law, or when the cases they do hear are governed by decisional rules materially different from those governing Title VII, is to thrust them unprepared into a complicated body of federal law with which the federal judiciary has already developed a substantial expertise. The result necessarily will be to create problems and expand the litigation of this already complex area.

One characteristic of federal judges which Congress considered important in 1972 is the fact that they are appointed for life and are thus insulated from various forms of political pressure. 1972 Leg. Hist. at 493 (individual views of Sen. Dominick). Congress considered it an important protection for the rights of defendants to have Title VII cases tried before judges with life tenure. *Id.* 549 (remarks of Sen. Dominick). This protection cannot be guaranteed if Title VII jurisdiction is found to be concurrent. Not all state judges are vested with life tenure, and defendant employers may not always be able to remove Title VII cases to federal courts.

4. **The greater hospitality of federal courts to the requirements of Title VII supports a finding of exclusive federal jurisdiction over Title VII claims.**

Another factor cited in *Gulf Offshore* as generally recommending exclusive federal-court jurisdiction over an area of federal law is the assumed greater hospitality of federal courts to peculiarly federal claims. 453 U.S. at 483-84. The court below read this factor as somehow requiring a showing that state courts would be hostile to Title VII actions. (A-10).

The Court of Appeals found no reason to believe that state courts might today be hostile to Title VII actions, but such a statement would not have been accurate in 1964. Title VII was adopted in part because many states were openly hostile to the rights of blacks and other minority groups. *See* 1964 Leg. Hist. at 3012, 3066 (remarks of Senator Clark). While state courts may "theoretically" be amenable to Title VII suits, they were not all amenable in practice when the Act was adopted.

Title VII contains several procedural devices that Congress considered important adjuncts to ensure that rights under Title VII could be effectively enforced. Section 706(f)(4) requires the chief judge of the district or the circuit "immediately to designate a judge in such district to hear and determine the case." The designated judge is required by § 706(f)(5) "to assign the case for hearing at the earliest practicable date and to cause the case to be in every way expedited." If the case is not scheduled for trial within 120 days after issue has been joined, the judge may appoint a master "pursuant to Rule 53 of the Federal Rules of Civil Procedure." The Seventh Circuit did not consider these provisions of the statute. Nor did it consider the provisions of § 706(f)(2) which allow the court to

appoint counsel for the complainant and waive the payment of fees, costs and security. However much a state court may embrace the policies of equal employment opportunity, it is not likely to welcome the use of procedural devices under Title VII which have no analog in the state system.

Sections 706(f)(2) and (5) both require that certain aspects of a Title VII action be handled in accordance with specified Federal Rules of Civil Procedure. By making these rules applicable to Title VII actions, Congress made it unmistakably clear that it expected those actions to be tried only in the federal courts where the rules apply.

Any alternative construction of the statute poses immediate problems. First, the courts could hold that the designated provisions of Title VII are not applicable when the cases are brought in state court. Yet some of those provisions, such as Rule 65, are designed to protect the rights of defendants who may have no opportunity to select a federal forum. The use of different procedures in Title VII actions, depending on whether they are brought in state or federal court, threatens to introduce another element of uncertainty into Title VII adjudication. In *Garner*, 356 U.S. at 491, this Court recognized that "a diversity of procedures are quite as apt to produce incompatibility or conflicting adjudications as are different rules of substantive law."

In contrast, the courts could also hold that these procedural provisions of Title VII apply in the state courts. Such a holding would force states to deviate from their normal administrative procedures solely to accommodate Title VII claims. There is no basis in the legislative history of Title VII to suggest that Congress attempted "to regulate the procedures and priorities of the state courts." *Valenzuela*, 739 F.2d at 436. State courts can be expected to resent the interference that Title VII would produce.

CONCLUSION

Because Donnelly attempted to initiate her Title VII suit in state court, and state courts lack jurisdiction over Title VII claims, the decision below should be reversed and the case remanded with instructions to dismiss the complaint.

JEFFREY IVAN PASEK
(Counsel of Record)
ALAN M. LERNER
JOHN F. LICARI
COHEN, SHAPIRO, POLISHER,
SHIEKMAN and COHEN
12 South 12th Street
Philadelphia, Pennsylvania 19107
(215) 922-1300

RONALD E. SANDHAUS
10990 Roe Avenue
Overland Park, Kansas 66207
(913) 345-3000
Attorneys for Petitioner

Of Counsel:
STEVEN J. TEPLINSKY
LEONARD R. KOFKIN
FAGEL, HABER & MARAGOS
140 South Dearborn, Suite 1400
Chicago, Illinois 60603
(312) 346-7500

No. 89-431

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

YELLOW FREIGHT SYSTEM, INC.,

Petitioner,

vs.

COLLEEN DONNELLY,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

BRIEF OF RESPONDENT

MICHAEL W. RATHSACK
(Counsel of Record)
77 West Washington Street
Suite 508
Chicago, Illinois 60602
(312) 726-5433

JOHN J. HENELY
JOHN J. HENELY, LTD.
75 East Wacker Drive
Suite 2200
Chicago, Illinois 60601
(312) 263-1733

Attorneys for Respondent

PETITION FOR CERTIORARI FILED SEPTEMBER 11, 1989
CERTIORARI GRANTED NOVEMBER 6, 1989

QUESTION PRESENTED FOR REVIEW

The question presented for review is whether federal courts have exclusive jurisdiction of employment discrimination cases brought under 42 U.S.C. Sec. 2000e, *et seq.*, Title VII of the Civil Rights Act of 1964.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Statutes

Congressional Material

Rules

Miscelianeous

No. 89-431

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

YELLOW FREIGHT SYSTEM, INC.,

Petitioner,

vs.

COLLEEN DONNELLY,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

BRIEF OF RESPONDENT

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit was handed down on April 28, 1989 and is reported at 874 F.2d 402. Appendix to Petition for Certiorari [hereafter A-____] at A-1 to A-19. Defendant's petition for rehearing was denied. [A-20]. The decision of the United States District Court for the Northern District of Illinois was handed down on March 17, 1989 and is reported at 682 F.Supp. 374. [A-23 to A-25].

The Report and Recommendation of the United States Magistrate entered on December 10, 1987 [A-26 to A-34] and the opinion of the District Court entered on November 22, 1985 [A-35 to A-39] on the issue of jurisdiction were not reported. The agreed order entered in the Circuit Court of Cook County, Illinois on August 9, 1985, was not reported. [A-40, A-41].

JURISDICTION

The judgment of the United States Court of Appeals for the Seventh Circuit was entered on April 28, 1989. The petition for rehearing filed by Yellow Freight System, Inc., was denied on July 17, 1989. The petition for certiorari was filed on September 11, 1989. This Court on November 6, 1989 granted certiorari as to Question One raised in the petition. This Court has jurisdiction of this matter pursuant to 28 U.S.C. Sec. 1254(1).

STATUTES INVOLVED

The following statutory sections are set out in the Petition at pages 3 through 7:

42 U.S.C. Sec. 2000e-5(f) [Section 706(f) of Title VII];

42 U.S.C. Sec. 2000e-5(j) [Section 706(j) of Title VII].

STATEMENT OF THE CASE

This case arises out of a claim, later admitted, that petitioner Yellow Freight System, Inc., [Yellow Freight] discriminated against respondent Colleen Donnelly [Donnelly] on the basis of her sex in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. Sec. 2000e, *et seq.* Donnelly applied for work with Yellow Freight in 1982. [Tr. 13, 14]. Yellow Freight's manager informed her that the company was not hiring but that she would be the first hired when the next opportunity arose. [Tr. 15]. She called that manager every week, as directed, to check for a job opening. [Tr. 16]. The manager falsely told her that Yellow Freight was laying off rather than hiring. [Tr. 33, 34]. The persons hired during that period were all male. [A-27].

Donnelly searched for other jobs, and obtained a part-time job in November of 1982. [Tr. 16-21, 29]. She filed a charge against Yellow Freight with the Equal Employment Opportunity Commission [EEOC]. Two charges were actually filed, with the second complaining of harassment after being hired. The latter charge (R. 32 at Ex. C) filed in October of 1984 was later disposed of by summary judgment and is not in issue. [The Seventh Circuit opinion recited that the charges were filed in March of 1985 (A-2), but that could not be correct in view of the date of the second charge and the fact that the right to sue letters were issued in that month. The Magistrate's Report shows that the first charge preceded her employment by Yellow Freight in June of 1984. [A-27]. This discrepancy does not bear on the question on review.] After the filing of the charge, Yellow Freight hired her. [A-27].

The EEOC on March 15, 1985 issued to Donnelly notice of the right to sue. [A-3; Joint Appendix (hereafter J.A.) at 11]. The Notice of Right to Sue notifies the recipient that he or she has a right to sue and that the right must be exercised within 90 days of receipt. [A-11]. The notice on its front page did not designate the court in which suit had to be filed nor did it preclude any particular forum.

On May 22, 1985, within the 90 day limitation period, Donnelly filed suit in the Law Division of the Circuit Court of Cook County, Illinois. [J.A. 5]. The complaint alleged that Yellow Freight had discriminated against plaintiff on the basis of her sex, in violation of the Illinois Human Rights Act, Ill.Rev.Stat. ch. 68, par. 1-1-1, *et seq.* (1983). The right to sue letters were attached as exhibits. [J.A. 5]. On June 25, 1985, Yellow Freight filed a motion to dismiss on the grounds that Donnelly had failed to exhaust her administrative remedies. [J.A. 19]. Donnelly then filed a motion requesting leave to file an amended complaint adding further civil rights claims; it specifically alleged violation of Title VII, 42 U.S.C. Sec. 2000e, *et seq.*, and Section 1983, 42 U.S.C. Sec. 1983. [J.A. 22, 23, 25]. Yellow Freight responded to that motion. [J.A. 36]. Next, an agreed order was entered on August 8, 1985 dismissing Donnelly's complaint with prejudice and continuing the motion for leave to file an amended complaint. [A-40]. On August 14, 1985, Yellow Freight filed a petition for removal. [R. 1].

Donnelly obtained leave in District Court [R. 6] to file an amended complaint which alleged violation of Title VII. [J.A. 42]. The court denied Yellow Freight's motion to dismiss that complaint. [A-35]. Yellow Freight answered and asserted affirmative defenses including failure to state a cause of action, lack of subject matter jurisdiction, un-

timely filing under Section 706(j) of Title VII/42 U.S.C. Sec. 2000e-5(j), and accord and satisfaction by reason of accepting employment. [R. 15]. Count II of that complaint arose out of conduct occurring after employment and was disposed of by summary judgment. [R. 36, 37].

The matter was tried before a magistrate. Yellow Freight admitted that it had discriminated against Donnelly in violation of Title VII, and a trial was had to determine damages. Donnelly was awarded back pay, retroactive seniority, pension contributions, attorneys's fees and prejudgment interest. [A-26]. The District Court adopted all of the magistrate's findings and conclusions with the exception of the award of prejudgment interest. [A-23]. Yellow Freight did not raise or obtain a ruling on its affirmative defenses.

On appeal, the Seventh Circuit [Chief Judge Bauer, with Judge Cummings and Judge Easterbrook concurring] unanimously affirmed the judgment and restored the award of prejudgment interest. [A-1]. Citing *Gulf Offshore Co. v. Mobil Oil Corp.*, 453 U.S. 473, 477, 478, 101 S.Ct. 2870 (1981), the Court agreed that state courts might presume concurrent jurisdiction over a federal cause of action unless Congress included in the statute an explicit statement vesting jurisdiction exclusively in federal court. [A-5]. The Seventh Circuit found that Title VII did not expressly give the federal courts exclusive jurisdiction. [A-6].

The Court then applied *Gulf Offshore* and held that the legislative history of Title VII did not show an unmistakable implication of exclusive federal jurisdiction, and that there was no disabling incompatibility between Donnelly's federal claim and state court adjudication of that claim. [A-7, A-9]. The Court noted that Title VII was never intended to be the exclusive remedy for employment dis-

crimination, and that state courts routinely adjudicated discrimination claims under state and federal civil rights laws. [A-8, A-10]. The Court therefore concluded that the principles of federalism mandated that jurisdiction of claims arising under Title VII be shared.

The Court further held that the amended complaint filed in the District Court related back to the original action by virtue of F.R.C.P. 15. [A-15]. The original action had been timely filed within 90 days of receipt of the right to sue letter. Donnelly's Title VII action was therefore not time barred.

Yellow Freight filed a petition for rehearing with a suggestion for rehearing en banc by the Seventh Circuit. That was denied on July 17, 1989. No judge requested a vote on the suggestion for rehearing en banc, and all the judges on the original panel voted to deny rehearing. [A-1, A-20, A-21]. Yellow Freight's petition for certiorari was granted by this Court on November 6, 1989.

SUMMARY OF ARGUMENT

I.A. This case is governed by the presumption that state courts enjoy concurrent jurisdiction with federal courts over claims based on federal laws. The parties agree that Title VII does not expressly reserve jurisdiction over Title VII claims to the federal courts and that *Gulf Offshore Company v. Mobil Oil Corp.*, 453 U.S. 473, 101 S.Ct. 2870, 69 L.Ed.2d 784 (1981) provides the controlling legal principle. Pet. br. at 5, 10. Therefore state courts have concurrent jurisdiction over Title VII claims unless there is either an unmistakable contrary implication in the legislative history or a clear incompatibility between concurrent jurisdiction and the federal interest.

I.B. The Act on its face mandates extensive state involvement in claim adjudication. It gives state agencies initial exclusive jurisdiction over claims, and allows the Equal Employment Opportunity Commission to defer entirely to state agencies. State court findings as to state claims must be given preclusive effect by federal courts. Title VII supplements, rather than supplants, state remedies for employment discrimination. Limiting the forum for adjudication of civil rights claims, as Yellow Freight proposes, would therefore stand in contradiction to the Act's expansive mechanism.

I.C. Title VII's legislative history does not contain a single statement that state courts were not to have jurisdiction over Title VII actions. Legislators' statements referred to by petitioner reflect an assumption that claimants would want to use the federal courts. However, that does not in any way lead to Yellow Freight's conclusion that Congress intended to preclude state court involvement. Title VII was chiefly aimed at those areas without state fair employment protections. Legislators assumed that claimants in those areas might not want to use state courts which might be hostile, and thus spoke in the belief that claimants had to be ensured access to federal courts. However, the history shows that they never implied that claimants would be compelled to use federal courts or restrained from using state courts.

I.D. State courts will have no difficulty in adjudicating Title VII cases. State courts not only routinely hear discrimination claims arising under state laws, but also routinely adjudicate civil rights claims arising under federal law. State agencies work hand in hand with the EEOC and

the EEOC can cede to states all rights to enforce federal claims. The establishment of this state/federal relationship rebuts any suggestion that state court jurisdiction is incompatible with federal interests. Nor is there any reason to believe that state courts would be hostile to such actions. As the Seventh Circuit pointed out [A-10], it is hard to imagine that state courts would be receptive to Section 1983 civil rights actions but hostile to Title VII actions.

II. In any event, the judgment in favor of the respondent must be affirmed for other reasons. Petitioner admitted liability and its limitation defense was waived. Further, the filing of the amended complaint related back to the timely filed state action, and the running of the limitation period was equitably tolled, just as it was in *Valenzuela v. Kraft, Inc.*, 801 F.2d 1170 (9th Cir. 1986).

ARGUMENT

I.

STATE AND FEDERAL COURTS EXERCISE CONCURRENT JURISDICTION OVER EMPLOYMENT DISCRIMINATION CLAIMS ARISING UNDER TITLE VII OF THE 1964 CIVIL RIGHTS ACT, 42 U.S.C. SEC. 2000e, *ET SEQ.*

A. The parties agree with the Seventh Circuit holding that the question is controlled by *Gulf Offshore* and that Title VII does not explicitly provide for exclusive federal jurisdiction.

In *Gulf Offshore Company v. Mobil Oil Corp.*, 453 U.S. 473, 101 S.Ct. 2870, 69 L.Ed.2d 784 (1981), this court reiterated and refined the criteria which determine whether state courts are to exercise concurrent jurisdiction over a claim arising under federal law. This Court first stated the general governing principle:

> The general principle of state-court jurisdiction over cases arising under federal laws is straightforward: state courts may assume subject-matter jurisdiction over a federal cause of action absent provision by Congress to the contrary or disabling incompatibility between the federal claim and state-court adjudication. * * * In considering the propriety of state-court jurisdiction over any particular federal claim, the Court begins with the presumption that state courts enjoy concurrent jurisdiction. *Gulf Offshore, supra*, at 478, 2875.

For Yellow Freight to prevail in this case, it must rebut the presumption of concurrent jurisdiction. The presumption can only be rebutted:

> . . . by an explicit statutory directive, by unmistakable implication from legislative history, or by a clear incompatibility between state-court jurisdiction and federal interests. *Gulf Offshore, supra*, at 478, 2875.

In the instant case, the Seventh Circuit concluded [A-6] and petitioner Yellow Freight does not dispute [pet. br. at 5] that the statute does not contain an explicit directive providing for exclusive federal jurisdiction of claims arising under Title VII. Therefore state courts enjoy concurrent jurisdiction unless the legislative history shows a contrary unmistakable implication, or unless there is a conflict between such jurisdiction and the goal of Title VII. The Seventh Circuit correctly held that neither of those exceptions was established.

B. Title VII on its face defers to the states for management of both state and federal employment discrimination claims. Restricting adjudication of Title VII claims to a federal forum would stand in contradiction to that statutory mechanism.

Contrary to Yellow Freight's method of analysis, the statute itself can first be profitably examined. The statute

on its face defers to the states for management of both state and federal employment discrimination claims. Title VII assumes a pivotal state role. As noted in *New York Gaslight Club, Inc., v. Carey*, 447 U.S. 54, 68, 100 S.Ct. 2024, 2032, 64 L.Ed.2d 723 (1980), Title VII was designed to supplement, rather than supplant, existing laws and institutions relating to employment discrimination. In determining whether employment discrimination exists, the EEOC must give "substantial weight" to the findings and the orders entered by state and municipal agencies in state and local employment discrimination actions. 42 U.S.C. Sec. 2000e-5(b). Where the state or municipality has a fair employment plan [FEP] in place which regulates the conduct being complained of, the federal agency must defer to the state or municipal process for a period of 120 days. 42 U.S.C. Sec. 2000e-5(c). No charge may be filed with the EEOC until that time period has expired. Where the EEOC itself files a charge, it must defer to the local agency and allow such agency a reasonable time to remedy the practice complained of. 42 U.S.C. Sec. 2000e-5(d).

The EEOC can turn the entire enforcement mechanism over to the state in certain situations. 42 U.S.C. Sec. 2000e-8(b), Section 709(b) of the Civil Rights Act of 1964. The EEOC is empowered to enter into workshare agreements with states whereby the EEOC defers entirely to the state agency. The federal agency can include in such an agreement a provision precluding the filing of a federal action. 42 U.S.C. Sec. 2000e-8(b), Section 709(b) of Title VII of the Civil Rights Act of 1964; *Kremer v. Chemical Construction Corp.*, 456 U.S. 461, 496, 102 S.Ct. 1883, 1897, 1905, 72 L.Ed.2d 262 (1982) (dissent). In that situation, adjudication of employment discrimination claims based on federal law rests entirely with the state.

The entire thrust of the Act is to involve federal, state and local agencies in the effort to alleviate discrimination. At each step, each ageney or court must work in conjunction with or defer to the other actors in the enforcement mechanism. The majority in *Kremer* noted at 477 that state FEP laws were explicitly made part of the Title VII enforcement scheme. In fact, this Court has ruled that federal courts must give preclusive effect to the findings of state FEP agencies where those findings are affirmed in state courts. *Kremer v. Chemical Construction Corp., supra*, at 476, 478. The same preclusion principle operates in civil rights cases brought under Section 1983, 42 U.S.C. Sec. 1983. *Kremer v. Chemical Construction Corp.*, 456 U.S. 461, 476, 102 S.Ct. 1883, 1895, 72 L.Ed.2d 262 (1982). The findings of state courts are thus binding on the federal courts and can prevent an aggrieved employee from instituting a civil rights action in federal court. See also, *University of Tennessee v. Elliott*, 478 U.S. 788, 792, 106 S.Ct. 3220, 3222, 92 L.Ed.2d 235 (1986) (citing *Kremer*).

The Act thus contemplates state court involvement and Title VII claims should logically be heard by state courts. In that fashion the claimant does not run the risk of having the federal claim precluded without an opportunity to raise his federally-based contentions, and the state court has the benefit of the full range of corrective measures provided by the combination of state and federal law. It would be anomalous to construe the Act so as to create a system requiring claims based on state law to be heard first but barring Title VII claims based on those same facts whenever the state court affirms the state agency finding. The consequence of petitioner's contrary contention would be piecemeal litigation of claims arising out of the same core of facts and essentially based on the same premise.

C. Title VII's legislative history does not rebut the presumption in favor of concurrent jurisdiction.

One thing is clear. To the best knowledge of respondent, no legislator ever stated or implied that an employee was to be precluded from using a state court forum. No one ever questioned an employee's right to ultimately file a case in a state court, and the sponsors of the bill never commented on that possibility. Yellow Freight has not been able to point to one instance in the legislative history in either 1964 or 1972 where concurrent state court jurisdiction was either questioned or challenged. The absence of any such commentary establishes that the legislative history falls far short of showing an "unmistakable implication" against concurrent jurisdiction.

Yellow Freight's contention, i.e, that the legislative history is hostile to state court jurisdiction, is weakened at its outset by the absence of authoritative legislative reports. *Kremer v. Chemical Construction Corp.*, 456 U.S. 461, 471 (fn. 9), 102 S.Ct. 1883, 1892, 72 L.Ed.2d 262 (1982). Much of the normal debate which crystallizes issues and from which intention can be inferred was absent. Beginning with the House Bill, which the Senate subsequently extensively amended, opponents complained that the Judiciary Committee which reported H.R. 7152 did not hold hearings. Bureau of National Affairs, The Equal Employment Opportunity Act of 1972, p. 26 (1973).

When that bill was sent to the Senate, a substitute bill [the Dirksen-Mansfield amendment] substantially modified it. That substitute did not go through the customary committee procedure. Instead, the substitute was worked out in informal conferences guided by party leaders from both sides of the political fence. Introduction, Legislative History of Titles VII and XI of Civil Rights Act of 1964,

U.S. Equal Employment Opportunity Commission, at 3001 [hereafter cited as Legis. His.]. As a result, there was no Senate committee report. The bill pended in the Senate for a long time [Bureau of National Affairs, The Equal Employment Opportunity Act of 1972 (1973) (hereafter BNA), at 27], but was the target of filibuster rather than constructive discussion. 110 Cong. Rec. 13079 (1964).

If the bill had been returned to the House with any unacceptable changes, it would have gone to conference committee and there would have been the threat of a second filibuster. To avoid that threat, Senate amendments were first approved by a floor leader in the House as part of that informal and thus unrecorded procedure. Statement of Sen. Clark, Legis. His. at 3010, 3074, 110 Cong. Rec. 7215, 12600 (1964). When the bill was returned to the House, it did not go to conference. Instead, the Senate amendments had be to voted on as a whole, with House debate limited to one hour. Legis. His. at 3063, 3064, 110 Cong. Rec. 15874 (1964); See BNA, p. 27. The usual indicia of legislative intent is thus missing in the legislative history. Editorial Introduction, Legis. His. at 3001.

The legislators were aware of the principle of exclusive jurisdiction, but never acted to apply the principle so as to preclude claims being brought in state court. If exclusive jurisdiction was raised, it was in the context of giving it to the states. Senator Dirksen, in his annotated version of the House bill, noted that a state with an FEP in place was given "exclusive jurisdiction" over the dispute for a limited period of time. Legis. His. at 3019, 110 Cong. Rec. 12819 (1964). That was presumably in response to an initial demand by some legislators for exclusive state jurisdiction, without right of federal intervention, where a state had enacted FEP laws. Senator Case

in his interpretive memorandum stated that such unlimited exclusive state jurisdiction would be impossible for technical reasons. Legis. His. at 3044, 110 Cong. Rec. 7214 (1964).

In the same vein, Senator Javits placed into the Record a report from the Association of the Bar of the City of New York. Legis. His. at 3090, 110 Cong. Rec. 8456 (1964). The Bar raised the question of whether federal law should entirely supercede state law in this area. It noted the likely volume of cases, and concluded by concurring with the proposed legislation which mandated parallel municipal, state and federal involvement and enforcement rather than federal preemption.

The question of precluding state jurisdiction was never explicitly or implicitly raised, despite the above comments which should have triggered such discussion if preclusion was intended. There are several likely explanations for this, none of which lead to the conclusion that Congress intended to bar state judicial involvement. First, the legislation itself was primarily intended to address a problem viewed as regional. At that time, many municipalities and states had viable and effective FEP laws and procedures. For example, Senator Saltonstall noted the effectiveness of the Massachusetts's program. Legis. His. at 3311, 110 Cong. Rec. 14191 (1964). Both proponents and opponents were aware of that. The southern region had no FEP laws at that time, and the south correctly perceived this bill as being directed at them. Comment of Sen. Clark, Legis. His. at 3344, 110 Cong. Rec. 7205 (1964); Comment of Sen. Ellender, Legis. His. at 3072, 110 Cong. Rec. 12599 (1964).

The target region was at that time thus viewed by many as being hostile to civil rights and to federal intervention. Regional animosity in that regard was evidenced

by exchanges of charges and denials. See, e.g., Comment of Sen. Clark, Legis. His. at 3072, 110 Cong. Rec. 12599 (1964). Southern opponents argued that there was no need for federal intervention, and proponents noted that the people with the greatest need for employment protection lived in states without state FEP laws. Interpretive memorandum of Sen. Clark and Sen. Case, Legis. His. at 3045, 110 Cong. Rec. 7214 (1964).

Given that background, legislators likely spoke with the assumption that persons discriminated against might need access to more amicable federal courts. However, they evidenced no intent to preclude state court jurisdiction. Congress wanted to expand civil rights in the employment arena and insure access to federal courts but, contrary to Yellow Freight's implication, there is no evidence that Congress wanted to limit the forum to be used for enforcement of the expanded remedy.

The absence of discussion as to whether state or federal forums were preferred is not remarkable when considered in light of the focus of the argument. The primary issue was whether the new civil rights were to be enforced by an agency or by the courts. BNA, at 25. A report from the Committee on Education and Labor on an earlier bill noted that American jurisprudence mandated that the judicial determinations be made by the judiciary rather than by an investigating agency. Legis. His. at 2160. Later, H.R. 405 provided for enforcement in federal court but was then modified to provide enforcement procedures similar to those used by the National Labor Relations Board. Editorial introduction, Legis. His. at 9. The Senate Bill [S. 1937] provided for an agency which would issue cease and desist orders enforceable in the federal courts of appeal. Editorial introduction, Legis. His. at 9; Comment of Sen. Clark, Legis. His. at 3068, 110 Cong. Rec.

12596 (1964). The points of difference in this argument were pointed out in a comparative analysis prepared by Sen. Clark's staff of Senate bill S. 1937 and H.R. 7152, the latter of which ultimately passed. Legis. His. at 3068, 3070, 3071, 110 Cong. Rec. 12596-12598 (1964).

Ultimately, compromise resulted in the enactment of a civil rights act which created a commission [the EEOC] without direct enforcement powers. Enforcement would be accomplished by means of suits brought by the EEOC or by the aggrieved employee.

In 1972, Congress again focused on the nature of the enforcement mechanism and not on the forum, and again no one stated or implied that claimants were to be precluded from using state courts. Congress deemed the 1964 Act flawed because the EEOC did not have meaningful enforcement power. Bureau of National Affairs, The Equal Employment Opportunity Act of 1972, Report of Senate Committee on Labor and Public Welfare, at 225 (hereafter 1972 Legis. His.) (1973); Statement of Rep. Erlenborn, Hearings Before the Subcommittee on Labor, Oct. 6, 1971, at 169. Congress therefore gave the EEOC the right to bring a civil suit in most cases, and also ultimately transferred jurisdiction to bring certain court actions from the Attorney General to the EEOC. BNA, at 2, 3, 28. In addition, a "substantial weight" requirement was added because the EEOC was not giving sufficient deference to state administrative decisions made under state FEP laws. *Kremer v. Chemical Construction Corp.*, 456 U.S. 461, 471 (fn. 8), 102 S.Ct. 1883, 1892, 72 L.Ed.2d 262 (1982).

As in 1964, the proponents of the judicial forum prevailed over the proponents of agency action in 1972. And as occurred in 1964, no legislator argued or implied that Title VII claimants were to be precluded from access to

state courts. The right to bring a private action, which is actually all that is at issue in this appeal, was unchanged. Section 706(f)(1) gave an employee the right to file suit, but that section notably did not limit or prescribe the court wherein such a suit was to be filed.

A remark cited in petitioner's brief at 25 sheds light on the failure of Congress to distinguish between federal and state jurisdiction. Obviously not all civil actions are filed in a federal court. Nevertheless, Senator Ervin remarked that the bill's intent was to have the validity of charges determined not by an agency but by the district courts "as in all other civil actions". 1972 Legis. His. at 975, 118 Cong. Rec. 1511 (1972). He thus spoke as if all civil litigation went to the federal court.

This type of remark shows that the legislators viewed the judiciary in a generic sense because they were comparing that mechanism to the agency mechanism. That explains why there were frequent references to federal court but no statements precluding state court involvement. The point is that legislators blurred that distinction because their focus was solely on the court versus agency issue in 1972, just as it was in 1964. The failure to acknowledge that distinction is further illustrated by Senator Case's response to a question in 1964. He said that the right to a jury trial in Title VII cases would vary in each jurisdiction and was dependent on whether there were separate equity and law dockets. Legis. His. at 3295, 3296, 110 Cong. Rec. 7255. Significantly, that type of docket separation at that time was a characteristic of only state and not federal courts. Law and equity were united in the federal courts in 1938. See Notes of Advisory Committee, F.R.C.P. 1.

The failure to specifically prescribe or preclude courts is further explained by the fact that the legislators did not expect significant court involvement by individual claimants. The EEOC was intended to provide for conciliation. Statement of Sen. Case, Legis. His. at 3277, 110 Cong. Rec. 7242 (1964). Experience taught that most grievances could be resolved through mediation. See Comment of Sen. Saltonstall, Legis. His. p. 3311, 110 Cong. Rec. 14191 (1964). The majority of suits were expected to be brought by the Attorney General rather than by employees. Answer of Sen. Case, Legis. His. at 3296, 110 Cong. Rec. 7255 (1964). Judicial intervention was to be the exception. Report of House Committee on Education and Labor, re H.R. 10144, Legis. His. at 2160.

Examination of the history thus rebuts the contention of Yellow Freight that Congressional references to the federal courts must be read to imply rejection of concurrent state jurisdiction. The grant of jurisdiction to the federal courts did not oust jurisdiction from the state courts. *Gulf Offshore Company, supra*, at 479, 2875; *Lindas v. Cady*, 150 Wis.2d 421, 441 N.W.2d 705, 708 (1989) (concurring with *Donnelly* and rejecting *Valenzuela* on all points). By the same token, reference to the use of federal courts did not indicate any intent to preclude state court jurisdiction. That conclusion is affirmatively supported by the legislative history.

The legislative history actually implies extensive state involvement. In a preliminary bill [H.R. 10144], the House Labor Committee noted its intent to respect the rights of the states and to provide for cooperative action between state and federal agencies. Report of House Committee on Education and Labor, Legis. His. at 2162. Senator Clark initially emphasized that the 1964 bill was drafted so "that the States and the Federal Government

can work together. When the bill is enacted, the State and the municipal agencies will continue to operate, and State laws will continue in force, except where they are inconsistent with title VII." Legis. His. at 3344, 110 Cong. Rec. 7205 (1964). The state and federal governments were to cooperate and thus provide a saving of effort by the federal government where state laws remedied the problem. Legis. His. at 3345, 110 Cong. Rec. 7205 (1964). Proponents intended to give the EEOC the power to cooperate with and to utilize state agencies. Interpretive memorandum of Sen. Clark and Sen. Case, Legis. His. at 3043, 110 Cong. Rec. 7213 (1964).

Title VII was to mesh with local and state FEP laws. Comment of Sen. Clark, Legis. His. at 3345, 110 Cong. Rec. 7205 (1964). In describing the changes wrought by his substitute bill, Senator Dirksen noted that the states would initially be given exclusive jurisdiction. Legis. His. at 3019, 110 Cong. Rec. 12819 (1964). The federal law was not intended to override any state law, and the federal authorities would "stay out of" any state or locality with an effective FEP. Answer of Sen. Clark to Sen. Dirksen's memorandum, Legis. His. at 3012, 110 Cong. Rec. 7216 (1964); 42 U.S.C. Sec. 2000e-7 [Section 708 of the Civil Rights Act]. That is commensurate with the principles of federalism, and such comments refute the contention that Congress was hostile to state involvement in adjudication of Title VII claims.

The Seventh Circuit correctly concluded that state and federal courts were intended to share Title VII jurisdiction. The contrary Circuit Court cases relied upon by petitioner can be readily distinguished by their failure to consider the *Gulf Offshore* criteria, by their lack of analysis, or as dicta. In *Valenzuela v. Kraft, Inc.*, 739 F.2d 434 (9th Cir. 1984), the court at 436 concluded that the presence

of legislators' references to federal courts and the absence of references to state courts "suggest[ed]" an intent to make federal jurisdiction exclusive. However, a "suggestion" is not sufficient under the *Gulf Offshore* test.

That court also relied on the presence in the Act of two procedural directives, i.e., 42 U.S.C. Sec. 2000e-5(j) [providing that any action brought under it was subject to appeal as provided in the statutes [28 U.S.C. Sec. 1291, 1292] which give appellate jurisdiction to the federal circuit courts] and 42 U.S.C. Sec. 2000e-5(f)(2) [referring to F.R.C.P. 65]. The first provision simply makes clear that further appeal is appropriate. That does not mean that the same appeal could not be taken in a state court system. As the dissent noted in *Kremer*, procedures available in state court closely approximate those available in federal court [*Kremer v. Chemical Construction Corp., supra*, at 495 (dissent)], and that analysis applies with equal validity to state appellate procedures. The second provision, i.e., reference to Rule 65, simply addresses injunctive procedure and is not dissimilar from the practice in state courts. Nothing in the history implies that this reference was meant to preclude state court jurisdiction. The Seventh Circuit characterized these as "procedural directives", and they do not control the substantive directives of the Act.

The absence of analysis in the other cited Circuit opinions is reflected in the opinion in *Bradshaw v. General Motors Corp.*, 805 F.2d 110, 112 (3rd Cir. 1986). The question of concurrent jurisdiction was not at issue and thus was presumably not briefed. It was only raised by the court at oral argument. The reviewing court's holding was without any analysis. The court went on to note [fn. 3 at 113] that even if concurrent jurisdiction existed, the plaintiff was unlikely to prevail for other reasons.

Yellow Freight also again pointed to *Long v. State of Florida*, 805 F.2d 1542, 1546 (11th Cir. 1986). Certiorari was denied as to the plaintiffs' petition [484 U.S. 820, 108 S.Ct. 78] but was granted as to certain questions raised by defendant [484 U.S. 814, 108 S.Ct. 65]. This Court subsequently reversed [*Florida v. Long*, 487 U.S. 223, 108 S.Ct. 2354, 101 L.Ed.2d 206 (1988)] although on grounds other than the point recited by Yellow Freight. The Circuit Court mentioned exclusive jurisdiction only in the context of applying res judicata. That court stated, without analysis, that res judicata was not applicable because the plaintiff could not have brought his Title VII claim in state court. The Eleventh Circuit apparently accepted a Florida appellate court's unsupported statement in an earlier state court case. See *Long v. Dept. Admin., Div. of Retirement*, 428 So.2d 688 (Fla. Dist. Ct. of Appeal 1983). That reliance may have been misplaced, as another division of that state court later upheld concurrent jurisdiction in an opinion which noted that the *Long* court later switched philosophy and found concurrent jurisdiction with respect to Section 1983 claims. *Jesson, Inc. v. Tedder*, 481 So.2d 554 (Fla. D. Ct. of App. 1986), review den. 491 So.2d 279 (1986).

Finally, in *Jones v. Intermountain Power Project*, 794 F.2d 546, 553 (10th Cir. 1986), the only question before the Tenth Circuit was whether state claims could be pendent claims in a Title VII action. The court answered in the affirmative at 552. The court then noted that its inquiry could end there, but discussed the matter further and cited *Valenzuela* without discussion. Again, the question was presented in an indirect context, apparently without benefit of briefs, and the holding was dicta. The only other contrary circuit opinion was that in *Dyer v. Greif Bros., Inc.*, 755 F.2d 1391, 1393 (9th Cir. 1985). The Ninth

Circuit raised the jurisdictional question sua sponte after removal and simply followed its prior ruling in *Valenzuela*. This later decision by a different panel was seemingly without enthusiasm, as reflected in its analysis and comment at 1393.

Yellow Freight also relied on two pre-amendment cases, *Hutchings v. United States Industries, Inc.*, 428 F.2d 303, 310 (5th Cir. 1970) and *Bowers v. Woodward & Lothrop*, 280 A.2d 772, 774 (D.C. Ct. App. 1971). The *Hutchings'* opinion holds simply that the EEOC filing limitation was tolled by invocation of a contractual grievance remedy. The point that the court was making at 310 was that a court, rather than an agency [the EEOC], had the power to enforce Title VII rights. As occurred in the legislative debate, the court's focus was on the agency versus court enforcement mechanism. That court was not asked to determine whether jurisdiction was exclusively federal.

In *Bowers*, the plaintiff employer sued for an indebtedness and the employee countersued for backpay. The employee claimed that he was discharged after an altercation, in violation of the Civil Rights Act, but the opinion does not state which Act was pleaded. The court simply noted at 774 without discussion or analysis that jurisdiction of Title VII claims was in the EEOC or the federal court, and that the trial court had no jurisdiction. Presumably the court meant that, as with the grievance rights, the employee had not presented them to the EEOC and had thus waived them.

If Yellow Freight is correct in its contention that the legislative history shows an unmistakable implication of exclusive federal jurisdiction, it should follow that there would be unanimity on that question. To the contrary, numerous courts have disagreed with petitioner's claim.

See [Federal] *Boyle v. Carnegie-Mellon University*, 648 F.Supp. 1318 (W.D. Pa. 1985); *Greene v. County School Board*, 524 F.Supp. 43 (E.D. Va. 1981); *Bennun v. Board of Governors*, 413 F.Supp. 1274 (D.C. N.J. 1976); *Peterson v. Eastern Airlines, Inc.*, 20 FEP Cases 1322 (W.D. Tex. 1979); *Williams v. Virginia Employment Commission*, 11 FEP Cases 232 (E.D. Va. 1975); [State] *Lindas v. Cady*, 150 Wis.2d 421, 441 N.W.2d 705 (1989); *Jesson, Inc. v. Tedder*, 481 So.2d 554 (Fla. App.Ct. 1986); *Peper v. Princeton*, 77 N.J. 55, 389 A.2d 465 (1978); and *Vason v. Carrano*, 31 Conn.Sup. 338, 330 A.2d 98 (1974).

The existence of this contrary authority, and the reasoning set out in the Seventh Circuit opinion, compel the conclusion that the Act contains no unmistakable implication of exclusive jurisdiction.

D. There is no incompatibility between concurrent state court jurisdiction and the federal interests expressed in Title VII. Concurrent jurisdiction allows the federal and state systems to function cooperatively and fulfills the Congressional scheme.

The Act mandates that state and federal authorities function cooperatively, and the exercise of concurrent jurisdiction is compatible with that mandate. Certainly there is no clear incompatibility between exercise of state court jurisdiction and fulfillment of the federal interests expressed in Title VII. If there is no clear incompatibility, then Yellow Freight has not overcome the presumption in favor of concurren jurisdiction. *Gulf Offshore Company v. Mobil Oil Corp., supra*, at 478, 2875. The factors used to test for compatibility, e.g., the desirability of uniform interpretation of the statute, the expertise of federal courts in federal law, and the assumed greater hospitality of federal courts to federal claims [*Gulf Offshore Company v. Mobil Oil Corporation, supra*, at 483, 484], were

recognized and applied by the Seventh Circuit [A-9], and that Court concluded that there was no incompatibility.

Practically speaking, concurrent jurisdiction is compatible with the goal of Title VII because that goal can best be achieved if the aggrieved employee can select the most amicable forum. If the state forum is selected, then the employee presumably believes that to be the most advantageous forum. In some areas, that may be the most convenient forum, the most expeditious forum, or the forum which will allow a better chance to obtain a lawyer. If the employer believes that such a forum will be disadvantageous for him, then the employer can always remove the case to federal court. 28 U.S.C. Sec. 1441(a),(b). [Petitioner claimed otherwise at 37, but did not point to any statute or rule that could bar removal.]

Access to a state forum can scarcely be argued to be incompatible with the intent of the statute when the objector can always remove the case to the federal system. Yellow Freight's contention is that state court involvement would be incompatible with the federal interest in preventing employment discrimination. It claims a concern that an employee filing in a state court might not receive all the benefits of a federal forum, e.g., uniformity, experienced judges, the possibility of being in a position to enforce the "speed up" procedure of 42 U.S.C. Secs. 2000e-5(f)(4),(5). That contention rings hollow and is exceedingly suspect. If an employee has any such fears, the employee can file in federal court; Title VII guarantees him that right. If the employee selects the state forum, and if the employer still has such munificent concerns about the enforcement rights of that employee, the employer can "assist" the employee by removing the case to federal court. From a practical perspective, there can be no incompatibility.

The Act itself presumes diverse forums. The preliminary investigation of discrimination claims is frequently handled by the state agencies under deferral policies. Indeed, the EEOC is allowed to defer entirely to the states in some worksharing circumstances and thus preclude any federal involvement whether administrative or judicial. As Senator Clark emphasized, the federal authorities were to "stay out of any State or locality which has an adequate law and is effectively enforcing it." Legis. His. at 3012, 110 Cong. Rec. 7216 (1964).

In this type of litigation, the questions to be litigated are usually ordinary, i.e., was there discrimination and, if so, what are the damages. There is no overriding issue which must be uniformly interpreted in order to secure the federal goal. This is different from the situation in *General Investment Co. v. Lake Shore & Michigan Southern Ry. Co.*, 260 U.S. 261, 43 S.Ct. 106, 67 L.Ed. 244 (1922) [pet. br. at 12] where the Court found exclusive federal jurisdiction over antitrust actions; the basis for that holding may well have been the perceived need for uniformity in an area of federal policy.

The question for the Title VII court, whether state or federal, is simply whether the employment discrimination was on the basis of race, sex or the other banned categories. That is a simple fact question. Resolution of the facts may be complex, but the issue is one of fact and not of policy. For those reasons, state court adjudication will not be incompatible with federal interests. After all, the state courts are already making preclusive determinations under state laws. *Kremer v. Chemical Construction Corp.*, *supra*, at 485.

In the same vein, it is instructive to note that Congress gave an agency rather than the judiciary the power to

determine when and in which classes of cases it would act or defer to the states. Interpretive memorandum of Sen. Clark and Sen. Case, Legis. His. at 3045, 110 Cong. Rec. 7214 (1964). Having given such power to a political agency, it seems unlikely that Congress intended to bar a state court system from making similar fact determinations, especially where the findings of those courts are already controlling in federal court actions.

Yellow Freight's implication [pet. br. at 36] that the state courts are incompetent to adjudicate Title VII claims is belied by the fact that state court adjudication of federal rights, including federal civil rights, is common. Both age and race cases have been successfully heard in state courts. Age cases brought under the ADEA [Age Discrimination in Employment Act of 1967, 29 U.S.C. Sec. 621 *et seq.*] can be brought in any court. 29 U.S.C. Sec. 626(c)(1). ADEA and Title VII are closely related both in terms of their prohibitions and their history. See, e.g., *Hodgson v. First Federal Savings & Loan Association*, 455 F.2d 818, 820 (5th Cir. 1972). Given those facts, the Seventh Circuit correctly determined [A-12] that it would be "incongruous to assume that state courts are incompetent to adjudicate Title VII claims."

Similarly, state courts have long heard federal civil rights actions brought under Section 1983 [42 U.S.C. Sec. 1983]. *Martinez v. State of California*, 444 U.S. 277, 283 [fn. 7], 100 S.Ct. 553, 558, 62 L.Ed.2d 481 (1980); *Davis v. Towe*, 379 F.Supp. 536, 538 (E.D. Va. 1974) (aff'd 526 F.2d 588 without opinion); *Green v. Klinkofe*, 422 F.Supp. 1021, 1026 [fn. 12] (N.D. Ind. 1976); *Bostedt v. Festivals, Inc.*, 569 F.Supp. 503, 507 (N.D. Ill. 1983); *Luker v. Nelson*, 341 F.Supp. 111 (N.D. Ill. 1972). As the Seventh Circuit noted [A-10], there is no reason to believe that state courts would be hostile to civil rights claims brought under

Title VII, but receptive to similar civil rights claims brought under Section 1983 or the ADEA.

In reality, many state agencies and state courts have been at the task of enforcing civil rights in the employment arena for much longer than the federal courts. State FEP agencies and laws predated Title VII. Report of the Bar Association of the City of New York, Legis. His. at 3090, 110 Cong. Rec. 8456 (1964). As petitioner admits at 36, 38 states had FEP laws by 1972. State courts are presumed competent to interpret such state FEP laws [*Kremer v. Chemical Construction Corp.*, *supra*, at 478] and there is no reason to presume otherwise with respect to the similar discrimination restrictions contained in Title VII. Neither petitioner nor the literature suggests the existence of any current problem brought about by state resolution of civil rights claims. That is the case not only because state courts are competent, but because state and federal procedures are similar. *Kremer v. Chemical Construction Corp.*, *supra*, at 495 (dissent).

Splitting the related discrimination actions and requiring them to run on parallel but separate state and federal tracks will only cause a duplication of effort and a further increase in the caseload of the already overburdened federal courts. The problem of heavy case loads in the courts in major metropolitan areas was mentioned as a consideration even in 1964. Explanation of amendments by Sen. Dirksen, Legis. His. at 3268, 110 Cong. Rec. 8194 (1964) [amendment limiting venue to place of occurrence in order to avoid concentration of filings in large metropolitan areas]. Nor should a claimant be placed in the "unenviable position of deciding whether to file his state law claims in state court and forego his Title VII claim, or to file a Title VII claim in federal court and relinquish his state law claims." *Quick v. General Motors Corpora-*

tion, 686 F.Supp. 1224, 1231 (fn. 1) (E.D. Mich. 1988) (dicta, suggesting that such a situation was contrary to the intent of *Alexander v. Gardner-Denver*, 415 U.S. 36, 48, 49, 94 S.Ct. 1011, 1020, 39 L.Ed.2d 147 (1974)).

Petitioner also relied on the views of the EEOC in other cases. For example, the EEOC filed a brief in *Pirela v. Village of North Aurora*, No. 89-1231, pending in the Seventh Circuit. There, the EEOC's position was taken to avoid claim preclusion and thus to expand opportunities for litigants with Title VII claims. Its position there is not surprising, given the different strategy and focus of that case. It did not file in this action, nor did the Solicitor General intervene, and its position in another matter cannot fairly be read to reflect the position it might have adopted if it had entered this case. By way of comparison, the EEOC filed an amicus brief supporting concurrent jurisdiction in *Peterson v. Eastern Airlines, Inc.*, 20 FEP Cases 1322 (W.D. Tex. 1979).

Yellow Freight contends that concurrent jurisdiction is incompatible because it is illogical [pet. br. at 33], it would lead to non-uniformity [pet. br. at 35], federal law would overwhelm state law [pet. br. at 35], and state court judges are not competent [pet. br. at 36]. It first argues that it is illogical to interrupt the state course of the case by sending the employee to the EEOC if that employee must then go back into the state system. That misses the whole point of Title VII. The intent is to resolve cases by conciliation, not to litigate them. Statement of Sen. Case, Legis. His. at 3277, 110 Cong. Rec. 7242 (1964). Mediation and conciliation were believed to be the most effective remedies. Report of House Committee on Education and Labor re H.R. 10144 (1962), Legis. His. at 2160; *Hutchings v. United States Industries, Inc.*, 428 F.2d 303, 309 (5th Cir. 1970). The process will be "interrupted" by

EEOC conciliation regardless of whether there is concurrent or exclusive jurisdiction, except where the EEOC has turned the entire process over to the state.

The uniformity and competency objections have already been addressed. *Ante*, at 25, 26. These cases basically involve resolution of whether the facts show discrimination or questions of damages, as in the instant case where liability was admitted and the only dispute was the amount of damages. If uniformity is not a problem in other federal claims brought in state courts under concurrent jurisdiction, then there is no reason to foresee difficulty with Title VII cases.

Yellow Freight's suggestion that state court judges are less competent because they only review rather than try cases de novo also is unfounded. That is the equivalent of arguing that an appellate court is less competent to rule on a case because it is limited to review under certain constrictions. As to petitioner's other attack on competency, it is true that most state court judges do not enjoy life tenure. However federal magistrates who, as in this case, try many of the Title VII actions, also do not enjoy that privilege. Yet no one would challenge their competency.

Petitioner's suggestion that state law would be overwhelmed by federal law is equally unfounded. The laws and regulations are essentially the same; they bar employment discrimination. State court enforcement of the federal civil rights provided in Section 1983 and the ADEA has not overwhelmed state law development in those areas. There is no reason to believe and no evidence to show that this would occur if Title VII civil rights claims were similarly brought in state court.

Because the same policy considerations underlie both state and federal FEP laws, because state courts have historically adjudicated these types of civil rights matters without difficulty, and because the employer can remove a case to a federal forum, concurrent jurisdiction is compatible with the aims of Title VII.

II.

IF THIS COURT DENIES CONCURRENT JURISDICTION, THE FINDING IN FAVOR OF RESPONDENT COLLEEN DONNELLY MUST NONETHELESS BE AFFIRMED. YELLOW FREIGHT WAIVED ANY LIMITATION DEFENSE, THE COMPLAINT FILED IN THE FEDERAL COURT AFTER REMOVAL RELATED BACK TO THE INITIAL FILING, AND THE LIMITATION PERIOD WAS THUS EQUITABLY TOLLED.

This point need be considered only if this Court limits jurisdiction over Title VII actions to the federal courts. In that event, the finding in favor of respondent should nonetheless be affirmed. Yellow Freight waived any defense that it might have had based upon the expiration of the 90 day limitation period. In the alternative, the filing of the amended complaint in federal court related back to the timely filed state court action, and the running of the limitation period was thus equitably tolled.

Donnelly filed her complaint in the state court in 1985. [J.A. 5]. After an unusual state court pleading scenario [A-16], Yellow Freight's motion to dismiss was denied by the district court and petitioner filed an answer and affirmative defenses. If Yellow Freight desired to follow through on its contention that the Title VII action was untimely because the specific allegation of a Title VII violation was filed more than 90 days after receipt of the right to sue letter, it had to raise that in its affirmative

defenses. The time limitation [42 U.S.C. Sec. 2000e-5(f)(1)] is akin to a statute of limitations [*Sessions v. Rusk State Hospital*, 648 F.2d 1066, 1070 (5th Cir. 1981); cf. *Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385, 392, 102 S.Ct. 1127, 1132, 71 L.Ed.2d 234 (1982)], and such defenses can of course be waived. Expiration of a limitation period is an affirmative defense and must be pleaded. F.R.C.P. 8(c).

In this instance, petitioner did not include that defense. Petitioner did allege that the action was "barred as untimely filed pursuant to Section 706(j) of Title VII (42 U.S.C. Section 2000(e)-5(j))." However, that section has nothing to do with the 90 day limitation period; it relates to the appeal process. Petitioner's defenses were not amended to add reference to the 90 day limitation period. Yellow Freight admitted liability [A-26], but offered no evidence and obtained no ruling as to any affirmative defense. For those reasons, petitioner waived the contention that the action was not timely filed. See *Baldwin County Welcome Center v. Brown*, 466 U.S. 147, 163, 104 S.Ct. 1723, 1731, 80 L.Ed.2d 196 (1984) (dissent). This point was not raised below, but a judgment can be affirmed on any basis found in the record. *Ryerson v. United States*, 312 U.S. 405, 408, 61 S.Ct. 656, 658, 85 L.Ed. 917 (1941).

Respondent must also prevail, regardless of the ruling on the jurisdictional question, because her Title VII action in federal court relates back to the original action. It is undisputed that the state court complaint was filed within 90 days of receipt of the notice of the right to sue. That complaint alleged sex discrimination on the part of Yellow Freight and attached thereto the two right to sue letters from the EEOC. [J.A. 5-16]. The charges underlying those letters had of course been served earlier on Yellow Freight.

After the case was removed to federal court, Donnelly filed an amended complaint which specifically alleged violation of Title VII of the Civil Rights Act of 1964. [J.A. 42-47].

That amended complaint, although filed more than 90 days after receipt of the right to sue letters, related back to the timely filed complaint. F.R.C.P. 15(a). For that reason, the Seventh Circuit ruled that respondent's Title VII action was timely filed. [A-15 to A-17]. In *Paskuly v. Marshall Field & Company*, 646 F.2d 1210, 1211 (7th Cir. 1981), plaintiff filed a complaint alleging sex discrimination. More than 90 days after receiving her right to sue letter, she amended her complaint to add other plaintiffs in a class action. The court affirmed the finding that the otherwise late amended complaint related back to the original action, noting that the EEOC filing and the original complaint each put the defendant on notice that it would be required to defend its employment practices.

In *Sessions v. Rusk State Hospital*, 648 F.2d 1066, 1070 (5th Cir. 1981), plaintiff filed a discrimination action based solely on Section 1981, which the court found was barred by the Eleventh Amendment. The court there held that an amended complaint raising Title VII claims related back to the first complaint even though the original complaint itself was barred. As in the instant case, both claims arose out of the same occurrence. The amended action was held to be timely. That court relied in part on *Caldwell v. Martin Marietta Corp.*, 632 F.2d 1184, 1187 (5th Cir. 1980) where the court allowed an amended complaint raising Title VII claims to relate back to the first complaint even though the first action was based only on Section 1981 and had itself been time barred. The Seventh Circuit's finding in this case that the amended complaint related back [A-15] is thus applicable even if Donnelly's original complaint did not specifically allege violation of Title VII.

Donnelly's complaint was thus timely filed because the 90 day filing limitation was equitably tolled. Yellow Freight was obviously timely informed of Donnelly's charges by virtue of the EEOC charge notice. The original complaint clearly alleged sex discrimination and attached the right to sue letters which refer to Title VII. Donnelly attempted to raise the specific Title VII allegations immediately in the state court [J.A. 24-35], but the case was removed by defendant before the proposed amendment could be ruled on. The first complaint and the amended complaint are both based on the same facts. Her filing in state court was done in good faith. Both the District Court and the Seventh Circuit wherein the state court is located confirmed her right to file in state court, and numerous other decisions supported her selection of that forum.

Under similar circumstances, the court in *Fox v. Eaton Corporation*, 615 F.2d 716, 719 (6th Cir. 1980), cert. den. 450 U.S. 935, 101 S.Ct. 1401 (1981), held that the state court filing tolled the limitation period for Title VII claims. Moreover, the plaintiff in *Valenzuela* was also allowed the benefit of equitable tolling. *Valenzuela II*, in an extensive review of that principle, cited the *Fox* rationale with approval and relied on *Baldwin* and *Zipes*. *Valenzuela v. Kraft, Inc.*, 801 F.2d 1170, 1175 (9th Cir. 1986). Respondent merits that same protection in this case.

Respondent requests that this Court either find that the limitation period was equitably tolled, or remand the matter to give the Seventh Circuit further opportunity to consider this issue.

CONCLUSION

For the reasons stated, respondent Colleen Donnelly requests that this Court find that state courts have concurrent jurisdiction over claims arising under Title VII and that the judgment below be affirmed. In the event that this Court determines that Congress intended Title VII jurisdiction to be limited to the federal courts, respondent requests that the judgment be affirmed for the alternative reason provided in Point II or, in the alternative, that the case be remanded for further consideration of that contention.

Respectfully submitted,

MICHAEL W. RATHSACK
(Counsel of Record)
77 West Washington Street
Suite 508
Chicago, Illinois 60602
(312) 726-5433

JOHN J. HENELY
JOHN J. HENELY, LTD.
75 East Wacker Drive
Suite 2200
Chicago, Illinois 60601
(312) 263-1733

Attorneys for Respondent

No. 89-431

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

YELLOW FREIGHT SYSTEM, INC.,

Petitioner,

vs.

COLLEEN DONNELLY,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

SUPPLEMENTAL BRIEF OF RESPONDENT TO PRESENT INTERVENING AUTHORITY PURSUANT TO RULE 25.5

MICHAEL W. RATHSACK
(Counsel of Record)
77 West Washington Street
Suite 508
Chicago, Illinois 60602
(312) 726-5433

JOHN J. HENELY
JOHN J. HENELY, LTD.
75 East Wacker Drive
Suite 2200
Chicago, Illinois 60601
(312) 263-1733

Attorneys for Respondent

PETITION FOR CERTIORARI FILED SEPTEMBER 11, 1989
CERTIORARI GRANTED NOVEMBER 6, 1989

3 pp

No. 89-431

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

YELLOW FREIGHT SYSTEM, INC.,

Petitioner,

vs.

COLLEEN DONNELLY,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

SUPPLEMENTAL BRIEF OF RESPONDENT TO PRESENT INTERVENING AUTHORITY PURSUANT TO RULE 25.5

Respondent Colleen Donnelly, pursuant to Rule 25.5 of this Court, presents an intervening authority that was not available at the time of the filing of the brief of respondent. Respondent cites the case of *Tafflin v. Levitt*, ____ U.S. ____, 110 S.Ct. 792, 58 U.S.L.W. 4157, decided by this Court on January 22, 1990.

Tafflin is cited in support of the proposition set out in Point I, Section C at page 12 of respondent's brief that the mere grant of jurisdiction to the federal courts and

the absence of legislative consideration of concurrent jurisdiction does not act to oust the jurisdiction of state courts.

Tafflin is also cited in support of the proposition set out in Point I, Section D at page 23 of respondent's brief that there is no clear incompatibility between concurrent jurisdiction and the federal interests expressed in Title VII. If state courts are to be permitted to hear cases brought under RICO, then they are similarly qualified to hear cases brought under Title VII.

Respectfully submitted,

MICHAEL W. RATHSACK
(Counsel of Record)
77 West Washington Street
Suite 508
Chicago, Illinois 60602
(312) 726-5433

JOHN J. HENELY
JOHN J. HENELY, LTD.
73 East Wacker Drive
Suite 2200
Chicago, Illinois 60601
(312) 263-1733

Attorneys for Respondent

No. 89-431

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

YELLOW FREIGHT SYSTEM, INC.,
Petitioner,

v.

COLLEEN DONNELLY,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF AMICUS CURIAE OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL IN SUPPORT OF THE PETITIONER

ROBERT E. WILLIAMS
DOUGLAS S. McDOWELL
GAREN E. DODGE *
McGUINESS & WILLIAMS
Suite 1200
1015 Fifteenth Street, N.W.
Washington, D.C. 20005
(202) 789-8600
Attorneys for Amicus Curiae Equal Employment Advisory Council

* Counsel of Record

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

TABLE OF CONTENTS

TABLE OF CONTENTS—Continued

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

No. 89-431

YELLOW FREIGHT SYSTEM, INC.,
Petitioner,
v.
COLLEEN DONNELLY,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF AMICUS CURIAE OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL IN SUPPORT OF THE PETITIONER

The Equal Employment Advisory Council, with the written consent of the parties, respectfully submits this brief as amicus curiae in support of the Petitioner. The letters of consent have been filed with the Clerk of this Court.

INTEREST OF THE AMICUS CURIAE

The Equal Employment Advisory Council (EEAC or Council) is a voluntary nonprofit association organized to promote sound government policies pertaining to employment discrimination. Its membership comprises a broad segment of the employer community in the United States, including both individual employers and trade associations. Its governing body is a board of directors composed of experts in equal employment opportunity. Their combined expertise gives the Council a unique depth of

understanding of the practical and legal aspects of equal employment policies and requirements. The members of the Council are committed to the principles of nondiscrimination and equal employment opportunity.

As employers, the Council's members are subject to the provisions of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §§ 2000e *et seq.* Most of EEAC's members operate in more than one state, and are thus concerned that Title VII will not be uniformly interpreted and enforced should this Court overturn the rule of law in four Circuits, and instead adopt the view of the Seventh Circuit below—that jurisdiction over Title VII claims does not rest exclusively with the federal courts.

It is the experience of the amicus that federal courts have more experience than state courts in administering Title VII's intricate procedures, and that federal courts are more hospitable to federal claims generally. In contrast, state courts have more experience in interpreting their own state human rights statutes—which often differ from Title VII, most notably with regard to the availability of jury trials and compensatory damage awards. Accordingly, EEAC has a direct interest in one of the issues presented in this case: whether federal courts have exclusive jurisdiction over Title VII claims, or whether state and federal courts have concurrent jurisdiction.

Because of EEAC's interest in Title VII cases generally, it has filed briefs amicus curiae to this Court in *Wards Cove Packing Co. v. Atonio*, 109 S. Ct. 2115 (1989); *Watson v. Fort Worth Bank & Trust*, 108 S. Ct. 2777 (1988); *United States Postal Service Board of Governors v. Aikens*, 460 U.S. 711 (1983); *Kremer v. Chemical Construction Corp.*, 456 U.S. 461 (1982) (specifically discussing, but not deciding, whether Title VII jurisdiction is limited to federal courts); *Texas Dept. of*

Community Affairs v. Burdine, 450 U.S. 248 (1981); *Furnco Construction Co. v. Waters*, 438 U.S. 567 (1978); and *International Brotherhood of Teamsters v. United States*, 431 U.S. 324 (1977), among others.[1] Accordingly, because of its past experience with these issues, the Council is well qualified to brief the Court in this case.

STATEMENT OF THE CASE

Colleen Donnelly, alleging that Yellow Freight committed sex discrimination in failing to hire her as a dockworker, filed charges with the Equal Employment Opportunity Commission (EEOC) in March of 1985. On March 15, she received from the EEOC a letter giving her the right to sue within 90 days. But instead of filing a federal suit, Donnelly filed a state court suit alleging sex discrimination in violation of the Illinois Human Rights Act. When Yellow Freight filed a motion to dismiss because she had failed to exhaust her administrative remedies, Donnelly filed a motion to amend her complaint to add a Title VII count. On August 9, the state court dismissed the state claim, but continued her motion to file the amended Title VII complaint. Yellow Freight then removed the case to federal court.

Donnelly again attempted to amend her complaint—this time with the federal district court—but Yellow Freight argued that the Title VII claim had not been filed within 90 days of receipt of the right-to-sue letter. Yellow Freight argued that Title VII jurisdiction is exclusively federal, and that any filing in a state court cannot toll Title VII's 90-day complaint filing requirement. Don-

[1] EEAC has also filed briefs in several other cases cited by the Seventh Circuit and the parties herein, including *EEOC v. Liberty Trucking*, 695 F.2d 1038 (7th Cir. 1982); *Mein v. Masonite*, 109 Ill.2d 1, 44 FEP Cases 189 (Ill. 1985) and *Long v. State of Florida*, 805 F.2d 1542 (11th Cir. 1986), *rev'd on other grounds*, 108 S.Ct. 2354 (1988) (briefs filed with the 11th Circuit, as well as with this Court in support of the petition for a writ of certiorari and then again on the merits).

nelly finally filed her Title VII claim a full six months after the initial right-to-sue letter, when the district court granted her motion to file the amended complaint. The court then denied Yellow Freight's motion to dismiss.

The Seventh Circuit affirmed the district court's decision in relevant part. Recognizing that Donnelly did not file her Title VII claim in federal court within 90 days of the right-to-sue letter, the court nevertheless ruled that the state courts have concurrent jurisdiction over Title VII claims. *Donnelly v. Yellow Freight System, Inc.*, 874 F.2d 402, 405-409 (1989). Specifically, the Seventh Circuit found that the "presumption" in favor of concurrent jurisdiction had not been overcome, even though the court noted that the relevant provisions of Title VII's language and history contain references only to federal (and not state) courts, and that all other courts of appeals that had ruled on the issue had found jurisdiction to be exclusively federal. The Seventh Circuit went on to opine that state court jurisdiction is not incompatible with federal interests because state courts will uniformly interpret Title VII, because state courts are not incompetent to adjudicate such claims, and because state courts will be just as hospitable to federal claims as are the federal courts.

SUMMARY OF ARGUMENT

Although this Court recognizes a presumption that federal and state courts exercise concurrent jurisdiction over federal claims, that presumption is rebutted when any one of the standards established in *Gulf Offshore Co. v. Mobil Oil Corp.*, 453 U.S. 473 (1981), is met. At least two of the *Gulf Offshore* standards are met with respect to Title VII herein. First, the presumption of concurrent jurisdiction over Title VII claims is rebutted because Title VII's language mentions only federal courts, and because the law's procedural structure—governing, for

example, appeals, the granting of temporary restraining orders, and the enforcement of conciliation agreements—makes sense only when state courts are excluded from the process. In addition, all references in the Congressional debates during the enactment of Title VII and its amendment in 1972 refer to federal, and not state courts. Moreover, *dicta* found in several decisions of this Court, and in the reasoned opinions of all courts of appeals except the Seventh Circuit, indicate that jurisdiction should be exclusively federal. *See, e.g., Valenzuela v. Kraft, Inc.*, 739 F.2d 434, 435 (9th Cir. 1984).

A second *Gulf Offshore* standard militating against concurrent jurisdiction is also present with regard to Title VII: state jurisdiction is clearly incompatible with federal interests. First, uniformity is critically important to the administration of Title VII. Concurrent jurisdiction, however, will not lead to a uniform interpretation of Title VII, particularly since state courts are not bound by federal rules of evidence and procedure or by the rulings of the federal appellate courts. Second, federal courts have vastly superior expertise in interpreting Title VII's complex administrative procedures. Indeed, several states have "ceded" their jurisdictonal authority over Title VII claims, presumably because the state courts are not prepared to administer the complexities of the statute. Third, federal courts likely will be more hospitable to Title VII claims than will state courts.

It is also clear that the Seventh Circuit improperly analogized to the Age Discrimination in Employment Act (ADEA), 29 U.S.C. § 621 *et seq.*, to find concurrent jurisdiction. Significantly, the ADEA procedures governing suits in the *private* sector incorporate procedures under the Fair Labor Standards Act, 29 U.S.C. § 201, *et seq.*, which specifically authorizes state jurisdiction. The more analogous ADEA procedures, those that govern suits by *federal* employees, retain jurisdiction exclusively in the federal courts. Thus, reliance upon the appropriate sec-

tion of the ADEA actually supports the idea of exclusive federal jurisdiction over Title VII claims.

Similarly, the Seventh Circuit erred in relying upon Section 301 of the Labor Management Relations Act (LMRA), 29 U.S.C. § 141 *et seq.*, since the legislative history of Section 301, unlike Title VII, specifically contemplates state jurisdiction. *Charles Dowd Box Co. v. Courtney*, 368 U.S. 502 (1962). Again, the relevant sections of the LMRA actually support the idea of exclusive federal jurisdiction over Title VII.

ARGUMENT

I. IN ACCORDANCE WITH THE STANDARDS EXPRESSED IN *GULF OFFSHORE v. MOBIL*, THIS COURT SHOULD RULE THAT JURISDICTION OVER TITLE VII IS EXCLUSIVELY FEDERAL BECAUSE OF CONGRESS'S UNMISTAKABLE IMPLICATION IN ENACTING THE LAW, AND BECAUSE OF THE CLEAR INCOMPATIBILITY BETWEEN STATE COURT JURISDICTION AND FEDERAL INTERESTS

Although the law recognizes a presumption that both state and federal courts have jurisdiction over federal statutory claims, this Court holds that such a presumption of concurrent jurisdiction can be rebutted. Most recently, in *Gulf Offshore Co. v. Mobil Oil Corp.*, 453 U.S. 473 (1981), this Court outlined the rebuttal standards under which jurisdiction will be found exclusively federal:

> In considering the propriety of state-court jurisdiction over any particular federal claim, the Court begins with the presumption that state courts enjoy concurrent jurisdiction. Congress, however, may confine jurisdiction to the federal courts either explicitly or implicitly. Thus, *the presumption of concurrent jurisdiction can be rebutted by an explicit statutory directive, by unmistakable implication from legislative history, or by a clear incompatibility between state-court jurisdiction and federal interests.*

Id. at 478 (citations omitted; emphasis added). *See also Claflin v. Houseman*, 93 U.S. 130 (1876). Significantly, this Court's use of the word "or" in the above language indicates that Yellow Freight may rebut the presumption by demonstrating the existence of only one—not all—of the *Gulf Offshore* standards.

As we now show, this Court should reverse the decision of the Seventh Circuit below since not only one, but at least two of the *Gulf Offshore* standards are present herein. First, Title VII's language and legislative history suggest exclusive federal jurisdiction and, second, there is a clear incompatibility between state court jurisdiction and federal interests in a uniform, ordered interpretation of Title VII.

A. Title VII's Language, Structure And Legislative History—As Well As Decisions By This And Other Courts—Indicate That Jurisdiction Should Be Exclusively In The Federal Courts

The language, structure and history of Title VII all clearly indicate that Congress intended that federal courts alone have jurisdiction over Title VII, thus satisfying one of this Court's *Gulf Offshore* standards. This indication of exclusive federal jurisdiction is supported in this Court's *dicta* in several other cases, and is buttressed by the decisions of all courts of appeals that have addressed the issue except the Seventh Circuit below.

1. *Title VII's Language And Procedural Structure Suggest Exclusive Federal, Not Concurrent, Jurisdiction*

Title VII's charge procedures and enforcement scheme are detailed and complex. *See* 42 U.S.C. §§ 2000e-5 through e-14; *New York Gaslight Club, Inc. v. Carey*,

447 U.S. 54, 63-64 (1980). Greatly simplified, Title VII permits an aggrieved individual to file a charge with the EEOC, or with a state or local agency authorized to process Title VII charges. If the individual does not first file his charge with an existing state agency, the EEOC must "defer" the charge to the state for at least 60 days. Upon expiration of this 60 day period, or at the conclusion of the state proceeding, the charge is returned to the EEOC.

The EEOC undertakes an investigation of the charge, and if it concludes that it is "more likely than not" that discrimination occurred, the EEOC then issues a "reasonable cause" determination and invites the respondent to conciliate. During this conciliation process, the EEOC attempts to persuade the respondent to eliminate the unlawful conduct and enter into a formal "conciliation agreement"--a commitment that can be enforced in federal court. If the EEOC finds no reasonable cause or, after finding cause and attempting without success to conciliate, decides not to file a lawsuit, it issues a right-to-sue letter, permitting the individual to bring a civil action. This initial court decision may be appealed to a United States Court of Appeals. Strict filing requirements and time constraints govern each stage of Title VII's procedural scheme. *See* Note, *Concurrent Jurisdiciton Over Title VII Actions*, 42 Wash. & Lee L. Rev. 1403, 1406-08 (1985).

Title VII's language addressing jurisdiction over the civil actions discussed above is contained at Section 706 (f)(3).[2] Under that section, "[e]ach United States district court . . . shall have jurisdiction of actions brought under this subchapter." The language suggests, but does not specifically state, that federal courts are to have exclusive jurisdiction over Title VII claims.

[2] 42 U.S.C. § 2000e-5(f)(3) states in relevant part:

> (3) *Each United States district court and each United States court of a place subject to the jurisdiction of the United States shall have jurisdiction of actions brought under this subchapter.* Such an action may be brought in any judicial district in the State in which the unlawful employment practice is alleged to have been committed, in the judicial district in which the employment records relevant to such practice are maintained and administered, or in the judicial district in which the aggrieved person would have worked but for the alleged unlawful employment practice, but if the respondent is not found within any such district, such an action may be brought within the judicial district in which the respondent has his principal office. (Emphasis added.)

The examination of such a complex procedural statute, however, does not end there. Section 706(j), the provision regarding appeals, provides that "[*a*]*ny civil action brought under this section . . . shall* be subject to appeal as provided in sections 1291 and 1292,"[3] the provisions that govern jurisdiction of the United States Courts of Appeals. It would make no sense that *state* court decisions regarding Title VII should be appealable to the federal courts of appeals. As the Ninth Circuit explained:

> Congress could not have intended that actions brought in state court be appealed to the federal circuit courts. Thus section 706(i)(sic) unmistakably implies that Congress intended to vest exclusive jurisdiction in the federal courts.

Valenzeula v. Kraft, Inc., 739 F.2d 434, 435 (9th Cir. 1984).

Similarly, the relationship between Section 706(f)(2) —the provision permitting the EEOC to obtain temporary restraining orders—and the rest of Title VII makes

[3] (Emphasis added). 42 U.S.C. § 2000e-5(j) provides as follows:

> (j) Appeals
>
> Any civil action brought under this section and any proceedings brought under subsection (i) of this section shall be subject to appeal as provided in sections 1291 and 1292, Title 28.

sense only if jurisdiction is exclusively federal. The Ninth Circuit stated:

> *Section 706(f)(2)*, 42 U.S.C. § 2000e-5(f)(2) (1976), *provides that "[a]ny temporary restraining order* or other order granting preliminary or temporary relief *shall be issued in accordance with rule 65 of the Federal Rules of Civil Procedure."* Section 706(f)(2) further provides that "[i]t shall be the duty of a court having jurisdiction over proceedings under this section to assign cases for hearing at the earliest practicable date and to cause such cases to be in every way expedited." *Whether Congress has the constitutional power to require state courts to follow Fed.R.Civ.P. 65 and to expedite certain cases is a matter of some doubt.* P. Bator, P. Mishkin, D. Shapiro & H. Wechsler, *Hart and Wechsler's The Federal Courts and the Federal System* 571-72 (2d ed. 1973). In any event, we do not believe that Congress attempted in Title VII to regulate the procedures and priorities of the state courts. *Therefore, section 706(f)(2) also unmistakably implies that Congress intended exclusive federal jurisdiction.*

Valenzuela, 739 F.2d at 435-36 (emphasis added).

Other language contained in Title VII, such as the methods for entering into and enforcing conciliation agreements, also militates in favor of exclusive federal jurisdiction. Under Section 706(b), after a finding of "reasonable cause," the EEOC is required to "endeavor to eliminate any such alleged unlawful employment practice by informal methods of conference, conciliation, and persuasion." 42 U.S.C. 2000e-5(b). The EEOC may bring a civil action pursuant to Section 706(f)(1), 42 U.S.C. § 2000e-5(f)(1), if the respondent will not enter into a conciliation agreement, and also may enforce a conciliation agreement in federal court. *EEOC v. Liberty Trucking Co.*, 695 F.2d 1038, 1040 (7th Cir. 1982).

The prominence Title VII's drafters gave to voluntary compliance in the statutory scheme evinces a substantial federal interest in actions to enforce conciliation agreements. That strong federal interest is further apparent in the frequency with which the EEOC is a party to conciliation agreements and in the extensive role it plays in negotiating, approving and monitoring such agreements. *Id.* at 1043. If this Court permits state courts to entertain actions to enforce conciliation agreements, there would be a serious potential for conflict with this federal interest.

It is the *amicus*' experience, for example, that there is a greater incentive to undertake serious settlement negotiations of disputes and seek creative solution to issues if employers, charging parties and the EEOC can be reasonably certain that the Title VII will be interpreted in a consistent manner. Consistency of interpretation is far more likely to be achieved under a system of exclusive federal jurisdiction. Clearly, therefore, the language of Title VII, and the ways in which its complex procedures interplay, strongly suggest that jurisdiction over Title VII matters should be exclusively federal.

2. *Title VII's Legislative History Clearly And Unmistakably Indicates That Congress Intended That Federal Courts Have Exclusive Jurisdiction*

Title VII's legislative history is well explained in Petitioner's brief at pp. 13-32 and is not repeated herein. A brief review of that history, however, indicates that Congress clearly and unmistakably intended that the federal courts should have exclusive jurisdiction over Title VII claims.

Most significantly, Title VII's legislative history contains no mention whatsoever of state courts. Rather, "when reference was made by members of Congress to bringing actions in court, the references were to *federal court*." *Dickinson v. Chrysler Corp.*, 456 F.Supp. 43, 46 (E.D. Mich. 1978) (emphasis by court); *see Valenzuela*, 739 F.2d at 436. For example, the Interpretive Memo-

randum of Title VII's Senate floor managers, Senators Clark and Case, in discussing the enforcement procedures, states:

> If a majority of the commission determine that reasonable cause exists, *ordinarily a suit will be brought in a Federal district court* in the judicial district in which the unlawful employment practice allegedly occurred or in the judicial district in which the respondent has his principal office . . . .
>
> *If the Commission decides not to sue*, or if at any earlier stage it terminates the proceeding for any reason, *the party allegedly discriminated against may, with the written permission of one member of the Commission, bring his own suit in Federal court* . . . .
>
> *The suit against the respondent*, whether brought by the Commission or by the complaining party, *would proceed in the usual manner for litigation in the Federal courts.*

110 Cong. Rec. 7213, (1964) (emphasis added). Similarly, the 1963 House Report indicates that Section 706(f)(3) "provides that the *district courts of the United States* . . . are given jurisdiction of actions brought under this title." H.R. Rep. No. 914, 88th Cong., 1st Sess. 29, *reprinted in* 1964 U.S. Code Cong. & Admin. News, 2355, 2405 (1963) (emphasis added). In addition, individual remarks during the 1964 debates by Senators Carlson, Case, Clark, Cotton, and Humphrey, and by Representatives Cellar, McCullouch, O'Hara and Ryan, among others, all reference federal (and not state) courts. *See* Petitioner's Brief at pp. 13-18.[4]

---

[4] As explained by the court in *Dickinson*, 456 F.Supp. at 45-46, the legislative history of Section 706(c), the "deferral" language, also supports the idea that Congress intended the states to become involved at the "deferral" stage, but that the federal courts were to be the forum "of last resort." Section 706(c), 42 U.S.C. § 2000e-5(c), was introduced in the Senate as part of a substitute

Similarly, during the debates regarding the 1972 amendments, Congress expressed its intent that federal courts were to retain exclusive jurisdiction over Title VII claims. Namely, many references were made with regard to retaining an individual's right to sue in federal court, yet no reference was made to suits in state courts. *See, e.g.*, remarks of Senator Jacob Javits regarding the Dominick amendment, ultimately approved by the Senate and signed into law. H.R. Rep. 238, 92d Cong. 1st Sess., at 905, *reprinted in* 1972 U.S. Code Cong. & Admin. News, 2137 (the backlog is the heaviest "[i]n the district courts, where under the Dominick amendment suits would have to be filed. . . .")

In fact, a Title VII provision adopted as part of the 1972 amendments (which, in part, incorporates Title VII protections for federal employees) indicates unequivocally that federal courts were to have exclusive jurisdiction. That provision, 42 U.S.C. § 2000e-16(d), fully incorporates for federal employees the procedures in Sections 2000e-5(f) through (k), those adopted in 1964 for private sector employees. Congress thus obviously intended federal employees to use Section 706(f)(3) in the same manner as private sector employees. Of

---

to the proposed act. One of the sponsors of the amendment, Senator Humphrey, commented:

> *The most important changes* give greater recognition to the role of State and local action against discrimination
>
> * * * *
>
> Provisions have been inserted . . . to *give States* which have . . . fair employment practices laws . . . *a reasonable opportunity to act under State Law before the commencement of any Federal proceedings* by individuals who allege discrimination.

110 Cong. Rec. 12707-8 (1964) (emphasis added). The court in *Dickinson* cited similar comments by Senators Case and Dirksen, and concluded that "[h]ad Congress intended the Title VII litigant to enforce his rights in state court, the entire series of debates relative to the addition of the state administrative remedies would have been meaningless." 456 F.Supp. at 46.

course, Congress did not intend that federal workers were to sue the federal government in *state* court.[5] Clearly, therefore, since Congress intended that federal workers bring suits in federal (not state) court, and since federal workers are subject to the same Title VII jurisdiction language as private sector workers, Section 706(f)(3) *must* allow suits only in federal courts.

The Seventh Circuit conceded that state courts are not mentioned during the legislative debates over Title VII. 874 F.2d at 407. The court, however, discounted the clear intent of Congress for exclusive federal jurisdiction by opining that Congress discussed only federal courts because Congress merely "has the power to grant or deny jurisdiction to the federal district courts." 874 F.2d at 407. This cynical statement neglects to consider that, in enacting and amending Title VII, Congress discussed not only its *own* power over the federal courts, but how Title VII's complex procedural structure would relate to other laws. Congress did not mention state courts because Congress envisioned no role for them in Title VII civil litigation.

Clearly, the "absence of reference to the state courts, combined with Congress's affirmative references to the federal courts suggests an intent to make federal jurisdiction exclusive." *Valenzuela*, 739 F.2d at 436. Congress intended the states to have no jurisdiction whatsoever.

3. *The Decisions By This Court, And By All Other Courts Of Appeals Except The Seventh Circuit, Support The Idea Of Exclusive Federal Jurisdiction*

The clear and unmistakable Congressional implications of exclusive federal jurisdiction are further bolstered by

[5] *See Lehman v. Nakshian*, 453 U.S. 156, 164 n.12 (1981). As Senator Dominick said, "The point is, however, that every governmental agency, State, local or Federal, has rights in the federal courts." H.R. Rep. 238, 92nd Cong, 1st Sess. at 1527.

the *dicta* in several of this Court's recent decisions. Although this Court in *Kremer v. Chemical Construction Corp.*, 456 U.S. 461, 479 n.20 (1982), indicated that it was not deciding the issue of exclusive federal jurisdiction, it did note that "federal courts were entrusted with ultimate enforcement responsibility" under Title VII. *Id.* at 468. Similarly, in *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 45 (1974), this Court noted that "federal courts have been assigned plenary powers to secure compliance with Title VII." Importantly, *Alexander*, 415 U.S. at 47, went on to list the forums available to a Title VII plaintiff. These include the EEOC, state and local agencies, and, importantly, federal courts. "Significantly, the Supreme Court made no mention of state courts." *Valenzuela*, 739 F.2d at 436.

In *New York Gaslight Club, Inc. v. Carey*, 447 U.S. at 64 (1980), this Court reiterated that the "ultimate authority" for Title VII compliance rests "in the federal courts." The Court went on to note that state remedies for discrimination are available at the "deferral" stage, but that "recourse to the federal forums is appropriate only when the State does not provide prompt or complete relief," *id.* at 65. And, as mentioned above (and as explained fully in Section IIA below), *Lehman v. Nakshian*, 453 U.S. at 164 n.12, notes that "[e]xclusive district court jurisdiction [under the federal employee provisions of the ADEA] is also consistent with the jurisdictional references in Title VII of the Civil Rights Act of 1964." Again, this is an indication that since federal employees may not sue the government in state court, and since federal employees are subject to the same jurisdictional language as private sector workers, that private sector claims also must not be brought in state court.[6]

[6] Several commenters support this view of exclusive federal jurisdiction. *See, e.g.*, Comment, *Closing the Escape Hatch in the Mandatory Withdrawal Provision of 28 U.S.C. § 157(d)*, 36 U.C.L.A. L. Rev. 417, 433 n.81 (1988) (Title VII "provides that review may

In addition, *Gulf Offshore* itself, while not a Title VII case, provides support for exclusive federal jurisdiction over Title VII claims. In *Gulf Offshore*, a worker filed a personal injury claim pursuant to the Outer Continental Shelf Lands Acts, 43 U.S.C. § 1331 *et seq.* (OCSLA). Under OCSLA, Congress had declared the outer continental shelf to be "an area of exclusive federal jurisdiction." Although federal law applied to the outer continental shelf, OCSLA, unlike Title VII herein, incorporated the "applicable and not inconsistent" laws of the "adjacent states to fill gaps in federal law." 453 U.S. at 480 & n.7. This Court ultimately found in *Gulf Offshore* that state and federal courts exercise concurrent jurisdiction. Obviously, Title VII is much different from OCSLA; under OCSLA, Congress expressly evinced its intent to rely upon preexisting state laws and procedures, while under Title VII, a new enforcement scheme was adopted and state courts were not even mentioned in the legislative debates. Moreover, under OCSLA, there is less need for uniform interpretation of laws in different areas of the country, than there is under Title VII. (See pp. 18-21, below.)

In addition, all courts of appeals that have considered the issue—except the Seventh Circuit, of course—have held that Title VII jurisdiction is exclusively federal. As discussed above, in *Valenzuela v. Kraft*, 739 F.2d at 436, the Ninth Circuit concluded, after an extensive discussion of the issue, that "Title VII actions must be brought exclusively in the federal courts." The Ninth Circuit in *Dyer v. Greif Bros., Inc.*, 755 F.2d 1391, 1393 (9th Cir. 1985), followed *Valenzuela*, noting that "jurisdiction over Title VII actions lies exclusively in the federal courts." Similarly, in *Bradshaw v. General Motors Corp., Fisher Body Div.*, 805 F.2d 110, 112 (3d Cir. 1986), the Third Circuit noted that Title VII "vests exclusive jurisdiction in the federal courts." In addition, in *Jones v. Intermountain Power Project*, 794 F.2d 546, 553 (10th Cir. 1986), the Tenth Circuit stated that "Title VII claims can be filed only in federal courts." And in *Long v. State of Florida*, 805 F.2d at 1546, a case in which EEAC participated as amicus, the Eleventh Circuit noted that "Long could not have brought his Title VII action in state court." Finally, in *Hutchings v. United States Industries, Inc.*, 428 F.2d 303 (5th Cir. 1970), the Fifth Circuit stated that "Congress . . . has made the federal judiciary . . . the *final* arbiter of an individual's Title VII grievance." *Id.* at 313-14 (emphasis by court).[7]

Accordingly, for the reasons demonstrated above, this Court should rule that Yellow Freight rebutted the "concurrent jurisdiction" presumption when it established one of the *Gulf Offshore* standards—that Congress implicitly confined jurisdiction to the federal courts through Title VII's language, legislative history and procedural structure, a conclusion that is buttressed in decisions by this Court and the reasoned decisions by various courts of appeals.

---

only be had in the federal district court. . . ."); Schenkier, *Ensuring Access to Federal Courts: A Revised Rationale for Pendent Jurisdiction*, 75 Nw. U. L. Rev. 245, 254 n.62 (1980); and C. Sullivan, M. Zimmer & R. Richards, *Federal Statutory Law of Employment Discrimination* § 3.14 (1980).

[7] The district courts are split, but several find exclusive federal jurisdiction. *See Varela v. Morton/Southwest Co.*, 681 F.Supp. 398, 400 (W.D. Tex. 1988) ("federal jurisdiction in these cases is exclusive"); *Glezos v. Amalfi Ristorante Italiano, Inc.*, 651 F.Supp. 1271, 1277 (D.Md. 1987) ("Title VII claims can be filed only in federal court"); *Dickinson v. Chrysler Corp.*, 456 F.Supp. 43 ("jurisdiction of Title VII litigation is exclusively vested in the federal courts"); and *McCloud v. National Railroad Passenger Corp.*, 25 FEP Cases 513, 515 (D.D.C. 1981). *But cf. Greene v. County School Board of Henrico County, Virginia*, 524 F.Supp. 43 (E.D. Va. 1981) (holding jurisdiction concurrent); and *Bennun v. Board of Governors of Rutgers*, 413 F.Supp. 1274 (D.N.J. 1976) (same).

B. Concurrent Federal And State Jurisdiction Over Title VII Claims Is Clearly Incompatible With Federal Interests

The presumption of concurrent jurisdiction is also rebutted by the establishment of a second *Gulf Offshore* standard that—*i.e.*, that concurrent jurisdiction is clearly incompatible with federal interests. As noted in *Gulf Offshore*, the following factors are relevant with regard to its "incompatibility" standard:

> The factors generally recommending exclusive federal-court jurisdiction over an area of federal law include *the desirability of uniform interpretation, the expertise of federal judges in federal law, and the assumed greater hospitality of federal courts to peculiarly federal claims.*

453 U.S. 473, 483-84 (emphasis added). As we now show, concurrent jurisdiction over Title VII claims is incompatible with federal interests because: 1) it is essential that Title VII be uniformly interpreted, yet the law would not be uniformly interpreted in the state courts; 2) state courts do not have the vast expertise of federal judges; and 3) federal courts will be more hospitable to federal claims than will state courts.

1. *Concurrent Federal And State Jurisdiction Will Not Foster A Uniform Interpretation Of Title VII*

The first factor cited by this Court in *Gulf Offshore* in militating against concurrent jurisdiction is the "desirability of uniform interpretation" of the law in question. 453 U.S. at 483-84. It is imperative that Title VII be interpreted uniformly, especially for companies with multistate operations. Otherwise, differing interpretations of the law will apply depending upon the locations of the facility. There is, of course, potential for conflict between the various federal courts, but this possibility is ameliorated by the ability of the federal circuits to

establish intra-circuit rules binding upon the other appellate judges and the district courts within the circuit. The federal courts thus are best equipped to achieve consistency of law.

State court decisions regarding Title VII, on the other hand, would not bind other states, nor even other courts within the same state. Differing interpretations of complex issues involving the application and meaning of Title VII provisions, EEOC guidelines, and federal court decisions inevitably would result from concurrent state court enforcement, particularly in areas in which binding federal court guidance and supervision is lacking. The resulting lack of uniform interpretation of law would confuse the application of Title VII principles, cause varying litigation results, and inhibit settlement and conciliation efforts by making employers, charging parties and the EEOC more reluctant to enter into conciliation agreements and more adversarial during the negotiations concerning the language to be employed in any proposed agreement.[8]

As a practical matter, concurrent jurisdiction also could undercut the conciliation process by encouraging the EEOC to obtain uniform interpretations in federal court by withholding approval of conciliation agreements and resolving cases only by consent decrees approved by the district courts after the institution of an action. Such

---

[8] In addition, if the idea of concurrent jurisdiction becomes the law of the land, employers with facilities in two or more states would be forced to attempt to predict on a state-by-state basis how a particular practice would fare in a particular state, as well as how a consent decree or conciliation agreement would be construed. The greater expertise of the federal courts in complex Title VII matters such as the validity of hiring goals or selection procedures and the ability of the national court system to resolve conflicts between the districts and circuits would facilitate the formulation of a consistent body of law, as well as enable the parties to make across-the-board, informed decisions concerning the language to be employed and the consequences of a violation of the agreement.

an approach would produce less than serious attempts to conciliate, contrary to Title VII's statutory mandate. It also would slow down the process, increase the case load of the federal courts, and force alleged victims of discrimination to wait much longer to receive compensation and other remedies.

Despite these policy considerations, the Seventh Circuit was quick to find that Title VII will be uniformly interpreted by state courts. It stated:

> There is no reason to believe that concurrent jurisdiction will lead to the arbitrary development of Title VII law. There already exists a great volume of Title VII law developed by the Supreme Court and lower federal courts and the states are bound by the Supremacy Clause to follow federal law.

874 F.2d at 407. In its Opposition to the Petition for a Writ of Certiorari, Respondent similarly argues that "decisions on the merits of the case will be the same regardless of the forum." Op. Cert. at 6.

The Seventh Circuit and the Respondent, however, miss one major point. Although states are bound by federal substantive law in interpreting Title VII, they are not bound by the Federal Rules of Civil Procedure and the Federal Rules of Evidence. *See Valenzuela*, 739 F.2d at 436. The Ninth Circuit in *Valenzuela*, for example, noted that Title VII specifically incorporates Fed.R.Civ.P. 65 for the issuance of temporary restraining orders, but that states are not so governed. 42 U.S.C. § 2000e-5 (f)(2). It is obvious, therefore, that restraining orders likely will be granted or denied under different circumstances depending upon whether the Title VII claim is heard by a state or federal court. As a practical matter, Title VII and other employment discrimination cases are often won or lost based upon such procedural rules. Concurrent jurisdiction is thus bound to lead to developments in the law that are not always uniform.

2. *The Vast Expertise Of Federal Courts Over The Adjudication Of Title VII Claims Favors Exclusive Jurisdiction*

The second factor discussed in *Gulf Offshore* recommending exclusive federal jurisdiction is "the expertise of federal judges in federal law." 453 U.S. at 484. The Seventh Circuit stated the inquiry as follows:

> *Although it is true that at this point in time federal judges may have developed greater expertise with respect to Title VII claims, there is no reason to presume state courts are not competent to adjudicate these issues.* Such a notion overlooks the obvious; most states have enacted employment discrimination laws, which are routinely litigated in state courts, and state court judges are accordingly quite familiar with discrimination issues.

874 F.2d at 407-408 (emphasis added).

First, this Court's inquiry in *Gulf Offshore* addresses in general whether federal courts have greater expertise in applying a certain federal law, yet the Seventh Circuit appears to concede that federal judges are the more experienced. The inquiry ought to end there.

The Seventh Circuit, however, subtly but erroneously changed the inquiry into whether state judges are *incompetent* even to address the issues. No one is suggesting that state judges are "not competent"—and the amicus declines to hold up the straw man that the Seventh Circuit has knocked down. The real issue is whether state judges uniformly possess the experience with the intricate, finely-balanced procedural scheme contained in Title VII. It is clear that they do not. Indeed, as two commenters have noted:

> Since the first effective establishment in 1875 of general federal question jurisdiction in the lower federal courts, those courts have developed a broad expertise in dealing with problems and applications of

> federal law. At the same time, state judges have become less exposed to the intricacies of federal substantive law.

Redish and Muench, *Adjudication of Federal Causes of Action in State Court*, 76 Mich. L. Rev. 311, 314 (1976). *See, e.g., Study of the Division of Jurisdiction Between State and Federal Courts*, American Law Institute, 166-67 (1969); Mishkin, *The Federal "Question" in the District Courts*, 53 Colum. L. Rev. 157, 158-60 (1953).

To be sure, the Seventh Circuit is correct when it notes that many states have enacted employment discrimination laws. But none of these laws contains the complex procedural machinery found in Title VII. Moreover, many of the state laws differ from Title VII in that they provide for jury trials or different remedies—such as compensatory and punitive damages. Accordingly, it is beyond cavil that state judges, even those in states with their own discrimination laws, do not always possess the expertise of federal judges in administering the complex procedural machinery, or in assessing appropriate federal remedies.

Indeed, some states have even "ceded" their jurisdiction over Title VII claims to the federal courts, presumably because the state court judges do not possess the necessary expertise, or because the state court machinery is not capable of handling the increased workload. For example, in *Bowers v. Woodward & Lothrop*, 280 A.2d 772, 774 (D.C. 1971), the District of Columbia Court of Appeals ruled that jurisdiction to remedy Title VII violations lay exclusively with the federal courts. And in *McCloud v. National Railroad Passenger Corp.*, 25 FEP Cases 513, 514 (D.D.C. 1981), the U.S. District Court respected the District's "confine[ment of] its consideration of employment discrimination claims to those arising under of District of Columbia law," ruling that the plaintiff, like Donnelly herein, failed to file his federal claim within 90 days in a court with jurisdiction.

Obviously, this Court should not force states that have declined jurisdiction over Title VII claims to entertain suits that they are not prepared to administer.

3. *Federal Courts Will Be More Hospitable To Federal Claims Than Will State Courts*

This Court's third factor recommending exclusive federal jurisdiction is the "assumed greater hospitality of federal courts to peculiarly federal claims." *Gulf Offshore*, 453 U.S. at 484. The Seventh Circuit below stated:

> [W]e find no basis for the assumption that state courts might not faithfully enforce Title VII. . . *most states have enacted employment discrimination laws. Whether enacted by state government or federal government, the same policy issues underlie employment discrimination laws. Thus from a theoretical viewpoint, state courts are as amenable to Title VII claims as federal courts.* In addition, any concern either party may have over the fairness of the forum is easily remedied. A plaintiff can file the complaint in federal court and a defendant can remove the complaint to federal court.

874 F.2d at 408 (citation and footnote omitted; emphasis added).

Initially, it should be noted that the Seventh Circuit again misstated this Court's standard. This Court in *Gulf Offshore* did not say that jurisdiction should be concurrent unless it can be proven that the state courts will not "faithfully execute" federal law. Rather, the standard is whether federal courts will be more hospitable to federal claims. As shown above, since federal judges are much more experienced with Title VII's complex procedural machinery, they likely will be more hospitable to federal claims. In addition, as also referenced above, just because states have their own discrimination laws does not mean that they will be as hospitable to federal claims as federal courts; most state laws have different procedures and remedies.

Some commentators have explained why federal courts would likely be more hospitable to federal claims than state courts. For example, Professor Mishkin, 53 Colum. L. Rev. at 158 stated:

> Presumably judges selected and paid by the central government, with tenure during good behavior—and that determined by the Congress—and probably even somewhat insulated by a separate building, are more likely to give full scope to any given Supreme Court decision, and particularly one unpopular locally, than are their state counterparts.[9] By the same token, should a district judge fail, or err, a more sympathetic treatment of Supreme Court precedents can be expected from federal circuit judges than from state appellate courts. (footnote omitted).

Professor Mishkin went on:

> Further, *the fact that the lower federal bench is chosen by officials of the national government under the same procedure as the members of the high Court suggests a greater similarity in the interpretation of national law, even on first impression, among the several parts of the national system than between the Supreme Court and any state system, or among the various state tribunals themselves.* Insofar as this is true, it also promotes a more uniform, correct application of federal law in that significant group

[9] The statutory provisions for review by the Supreme Court of state court decisions have always reflected a fear that state judges might be prone to narrow unduly the scope of national power. There is some historical evidence to support that apprehension. See Frankfurter and Landis, *The Business of the Supreme Court*, 4-11 at 189-191 and n.22 (1928); Warren, *Legislative and Judicial Attacks on the Supreme Court of the United States—A History of the Twenty-Fifth Section of the Judiciary Act*, 47 Amer. L. Rev. 1, 161 (1913). The present provisions for appeal (as distinguished from certiorari) seem founded on the same premise. 28 U.S.C. § 1257. Compare the provisions for review of cases coming from the federal intermediate appellate courts. 28 U.S.C. § 1254.

> of cases where, either because of the novelty of the question, disproportionate expense or for other reasons, recourse to the Supreme Court has previously either not been attempted or been precluded.

Id. at 158-159 (footnotes omitted; emphasis added).

Accordingly, it is clear that Yellow Freight established a second *Gulf Offshore* factor, that concurrent federal and state jurisdiction over Title VII claims is incompatible with federal interests. This Court, therefore, is requested to find that the presumption of concurrent jurisdiction is rebutted.

II. THE SEVENTH CIRCUIT ERRED IN RELYING UPON THE AGE DISCRIMINATION IN EMPLOYMENT ACT AND SECTION 301 OF THE LABOR MANAGEMENT RELATIONS ACT

A. In Misreading The ADEA And This Court's Implementing Decisions, The Seventh Circuit Failed To Note That The Relevant Provisions Of The ADEA Actually Support Exclusive Federal Jurisdiction

The Seventh Circuit erroneously relied upon the Age Discrimination in Employment Act (ADEA) as analogy in finding concurrent state and federal jurisdiction over Title VII claims. In doing so, the court below grossly misread the ADEA and this Court's interpretation of that statute.

To begin, the ADEA, 29 U.S.C. § 621, *et seq.*, contains two separate enforcement schemes: one for *private* sector employees, and a separate provision for employees of the *federal government*. The private sector enforcement scheme is found at Section 7 of the ADEA, 29 U.S.C. § 626. It allows for jury trials, provides that "[a]ny person aggrieved may bring a civil action in any court of competent jurisdiction," and generally incorporates the enforcement provisions of the Fair Labor Standards Act, 29 U.S.C. § 201, *et seq. Lehman v. Nakshian*, 453

U.S. 156, 163 (1981).[10] Significantly, Section 16(b) of the FLSA, 29 U.S.C. § 216(b), specifically contemplates concurrent jurisdiction: it permits lawsuits in "any Federal or State court of competent jurisdiction." *See Oscar Mayer & Co. v. Evans*, 441 U.S. 750 (1979).

In contrast, the federal employee section, Section 15, contains enforcement language similar to that found in Title VII.[11] Specifically, Section 15(c) provides:

> Any person aggrieved *may* bring a civil action in any *Federal district court* of competent jurisdiction for such legal or equitable relief as will effectuate the purposes of this Act.

29 U.S.C. § 633a(c) (emphasis added). As this Court noted in *Lehman*, Section 15's enforcement scheme was patterned after Title VII's, not the FLSA's. 453 U.S. at 164 n.12. As evidence of this Congressional intent, *Lehman* noted that lawsuits by federal workers do not permit jury trials, and, significantly, that Congress decided to "*limit jurisdiction to the federal district courts.*" *Id.* (emphasis added). This Court further explained that Congress may have decided to confine jurisdiction under the ADEA to federal courts "so that there would not be trials in state courts of actions against the Federal Government." *Id.*

The Seventh Circuit below inexplicably relied, not upon Section 15 of the ADEA, the section modeled after Title

[10] Specifically, the ADEA's private sector enforcement provision, 29 U.S.C. § 626(b), incorporates sections 211(b), 216—except for 216(a)—and 217 of the FLSA. Importantly, section 216(b) authorizes lawsuits "in any Federal or *State* Court of competent jurisdiction." (Emphasis added.) Clearly, therefore, this statutory language is in no way analogous to the Title VII language. As noted earlier, Title VII's language mentions federal courts, but makes no mention whatsoever of state courts.

[11] Again, the Title VII language relevant to this inquiry is that "[e]ach United States district court . . . shall have jurisdiction of actions brought under this subchapter." 42 U.S.C. § 2000e-5(f)(3).

VII's enforcement scheme, but rather on Section 7. Indeed, the Seventh Circuit stated:

> Given the extensive similarities between [the private sector provisions of Title VII and the ADEA], and the fact that the state courts have jurisdiction over private-sector ADEA claims, it seems incongruous to assume that state courts are incompetent to adjudicate Title VII claims.

Id. at 409. Such reliance upon Section 7 makes no sense. Even though it relies on the ADEA for its conclusion, the Seventh Circuit states that "we do not find the different jurisdictional language of Title VII and the ADEA significant." *Id.* at 408 n.9. To the contrary, the different statutory language makes all the difference in the world, for it illustrates that Congress knows how to express clear intent to convey concurrent jurisdiction when it means to do so. Again, Section 7 incorporates Section 216(b) of the FLSA, which *specifically permits* suits to be brought in both state and federal courts. The relevant analogy is Section 15, which contemplates exclusive federal jurisdiction.

Accordingly, not only did the Seventh Circuit err in relying upon the ADEA to support the idea of concurrent jurisdiction for Title VII, but the ADEA actually points in the opposite direction: that jurisdiction over Title VII should be exclusively federal. Section 15, the language that more closely mirrors Title VII, does not allow concurrent jurisdiction. *Valenzuela*, 739 F.2d at 436 (ADEA Section 15 suits are consistent with the jurisdictional references in Title VII).

B. The Seventh Circuit Also Erred In Relying Upon Section 301 Of The Labor Management Relations Act

Similarly, the Seventh Circuit erred in relying upon federal labor law as analogy and support for its decision. In this regard, the Seventh Circuit stated:

> Even when federal law is not clearly developed or preempts state law, jurisdiction may be exercised concurrently. For example, even though § 301(a) of the Labor Management Relations Act of 1947, 29 U.S.C. § 185, authorizes federal courts to fashion a body of federal law for the enforcement of collective bargaining agreement, *Textile Workers v. Lincoln Mills*, 353 U.S. 448 (1957), state courts exercise jurisdiction over claims brought under § 301(a) concurrently with the federal courts.

874 F.2d at 407 n.7. In doing so, the Seventh Circuit cites this Court's decision in *Charles Dowd Box Co. v. Courtney*, 368 U.S. 502 (1962).

But Section 301, and this Court's reading of it in *Charles Dowd*, indicate a clear distinction with Title VII—Congress specifically intended the state courts to interpret section 301. Section 301(a) states that "[s]uits for violation of contracts between an employer and a labor organization . . . may be brought in any district court of the United States having jurisdiction . . . ." This Court in *Charles Dowd*, 368 U.S. at 512, pointed out that the legislative history made sure that "state court jurisdiction would not be ousted by enactment of federal law." A colloquy between Senators Murray and Ferguson (the bill's spokesman) clearly indicates that the bill "takes away no jurisdiction of the State Courts." *Id.* As this Court noted in *Charles Dowd*, 368 U.S. at 508, "[t]he legislative history makes clear that the basic purpose of § 301(a) was not to limit, but to expand, the availability of forums for the enforcement of contracts made by labor organizations." [12] In stark contrast,

[12] This Court noted in *Alexander v. Gardner-Denver*, 415 U.S. at 48-49, that Title VII also was designed to "supplement, rather than supplant, existing laws and institutions relating to employment discrimination." *See* decision by the Seventh Circuit below, 874 F.2d at 407 ("Title VII was never intended to be the exclusive remedy"). But in *Alexander*, as noted above, this Court specifically listed the forums available to Title VII plaintiffs, and state courts were not among those listed.

as fully explained above and in Petitioner's brief at pp. 13-32, no reference to concurrent state court jurisdiction was made whatsoever during the 1964 or 1972 debates over Title VII.

A better analogy to Title VII than Section 301 are the procedural schemes under federal labor law that the Seventh Circuit below *failed* to mention. For example, under Section 10(e) of the LMRA, enforcement of orders guaranteeing Section 7 rights is vested *exclusively* in the federal courts. 29 U.S.C. § 160(e) (the National Labor Relations Board "shall have power to petition any court of appeals of the United States or . . . any district court . . ." for enforcement of an NLRB order). *See The Developing Labor Law* (BNA) 1695 (Morris, ed. 1983). Similarly, petitions for review of final orders pursuant to Section 10(f) are also exclusively with the federal courts. *Id.* at 1700-01. 29 U.S.C. § 160(f). In addition, Section 10(j) injunctions may be obtained only in a "United States district court." 29 U.S.C. § 160(j). *Developing Labor Law* at 1638. Finally, suits against the NLRB for actions contrary to the NLRA must be brought in a "federal district court." *Employment Coordinator* (Research Institute of America) at LR 44,003. *See Leedom v. Kyne*, 358 U.S. 184 (1958).

It is crucial for this Court to understand the reasons why Section 301 claims can be heard in state courts, but that other suits involving federal labor law cannot. First, of course, is the legislative history cited in *Charles Dowd* permitting Section 301 suits in state courts. Just as important is the policy rationale. Section 301 is merely a mechanism for enforcing a contract between a company and a union. Thus, the idea of concurrent jurisdiction makes sense: if a state court makes a mistake in interpreting a contract between two parties, only the parties will be affected. The idea of exclusive federal jurisdiction over other NLRB matters, of course, is that federal policy making (affecting large numbers of people

not directly parties to the suit) ought to be in the hands of judges who are skilled in the interpretation of federal labor law, and who will assure uniformity and predictability. The similarities with Title VII are obvious—interpretation of such a complex statute should be in the hands of skilled federal judges.

Thus, since the Seventh Circuit erred in relying upon the ADEA and Section 301 of the LMRA, and since the relevant provisions of those statutes actually *support* the idea of exclusive federal jurisdiction, this Court should reverse the decision of the Seventh Circuit below.

CONCLUSION

For the foregoing reasons, this Court should reverse the decision of the Seventh Circuit below, and hold that jurisdiction over Title VII claims is exclusively federal.

Respectfully submitted,

ROBERT E. WILLIAMS
DOUGLAS S. MCDOWELL
GAREN E. DODGE *
MCGUINESS & WILLIAMS
Suite 1200
1015 Fifteenth Street, N.W.
Washington, D.C. 20005
(202) 789-8600
Attorneys for Amicus Curiae
Equal Employment
Advisory Council

December 21, 1989

* Counsel of Record